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### An Essay on Teaching Contracts and Commercial Law for the First Time (Even If You Have Taught These Courses Many Times Before)

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# AN ESSAY ON TEACHING CONTRACTS AND COMMERCIAL LAW FOR THE FIRST TIME

(EVEN IF YOU HAVE TAUGHT THESE COURSES MANY TIMES BEFORE)

GARY MONSERUD

I. INTRODUCTION.....	116
II. PREPARING A COURSE FOR THE FIRST TIME.....	117
A. LEARNING THE SUBJECT MATTER .....	117
B. CHOOSING A CASEBOOK .....	120
1. <i>Coverage</i> .....	122
2. <i>Case Selections</i> .....	123
3. <i>Editing</i> .....	124
4. <i>Internal Logic</i> .....	125
5. <i>Materials Between the Cases</i> .....	125
6. <i>Problems</i> .....	126
7. <i>Editorial Views</i> .....	127
8. <i>Accessible Editors, Available Supplements, and             Technical Considerations</i> .....	127
C. BUILDING A SYLLABUS .....	128
1. <i>Assignments in the Casebook</i> .....	129
2. <i>Assignments or Recommendations of Collateral             Reading Material</i> .....	130
3. <i>Rules for the Classroom</i> .....	131
4. <i>The Professor's Expectation of the Students</i> .....	132
5. <i>Disclosures About Testing and Grading</i> .....	133
6. <i>A Statement of Objectives for the Course</i> .....	134
7. <i>A Statement About Teaching Ethics</i> .....	134
8. <i>Bibliography of Secondary Sources</i> .....	135
9. <i>Contact Information</i> .....	135

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J.D. University of South Dakota School of Law, 1976; LL.M. New York University School of Law, 1985; Professor of Law, New England School of Law, Boston, Massachusetts, 1987-present. As an author, I am especially grateful to Associate Dean Paul Teich at New England School of Law for his thoughtful and constructive comments on a draft of this essay. Moreover, I recognize with deep gratitude the Honorable Andrew W. Bogue, Senior U.S. District Judge, District of South Dakota, for his many years of friendship and his encouragement, which began during a judicial clerkship from 1976-1978 and continues presently. The clerkship experience and Judge Bogue's confidence in me were invaluable as I struggled to move into law teaching. Finally, thanks to Kara Gansmann, Editor in Chief of the *N.D. Law Review* for bringing this essay to publication with courtesy, dedication, and good humor.

III. PREPARING FOR THE FIRST DAY IN CLASS (AND FOR EACH SESSION THAT FOLLOWS) .....	136
A. MASTERY OF THE ASSIGNED READING (AND APPROPRIATE SUPPLEMENTARY SOURCES) .....	137
1. <i>Mastering the Principal Cases Assigned</i> .....	137
2. <i>Reading Behind the Principal Cases</i> .....	138
3. <i>Law Review Articles</i> .....	139
4. <i>Treatises</i> .....	140
5. <i>The Restatements</i> .....	140
6. <i>Preparing to Teach Statutory Sections</i> .....	141
7. <i>Problems for Class</i> .....	144
B. DEVELOPING A SENSE OF THE STUDENTS AND THEIR QUESTIONS .....	145
C. DEVELOPING A PLAN FOR USING THE CLASSROOM TIME .....	146
IV. MAKING SENSE OF TIME IN THE CLASSROOM .....	148
A. SETTING THE TONE .....	150
B. ASKING QUESTIONS AND LISTENING FOR RESPONSES ...	155
1. <i>Reconstructing a Relationship as it Must Have             Appeared Before the Litigation was Commenced</i> .....	159
2. <i>Reconstructing the Procedural History of the             Case as Reported</i> .....	160
3. <i>Questions Bearing Upon a Court's Decision(s),             Rationale, and the Disposition of the Case</i> .....	161
4. <i>Questions on Hypothetical Fact Patterns Before or             After Discussing Cases</i> .....	163
5. <i>Questions Ranging Far Beyond the Case Law</i> .....	163
C. LECTURING OR COMMENTING ON THE LAW .....	164
1. <i>Previewing an Area of the Law</i> .....	164
2. <i>Summarizing the Law</i> .....	165
3. <i>Clarifications Along the Way</i> .....	165
4. <i>Answering Questions Common to Many and             Raising Questions on Current Use of the Law</i> .....	166
5. <i>Parsing Statutes</i> .....	167
D. SOLVING PROBLEMS AND DEVELOPING ARGUMENTS IN CLASS .....	167
1. <i>Moving Students to Accept the Application of             Rules from Cases and Statutes Where There Is             Little Room for Argument</i> .....	169

2. <i>Developing Arguments When Sensible Arguments Are Reasonably Possible on Both Sides</i> .....	169
3. <i>Issue Spotting and Developing Arguments in Complex Fact Patterns</i> .....	171
4. <i>Evaluating Arguments for Their Strengths and Weaknesses</i> .....	172
5. <i>Summary</i> .....	172
V. TESTING AND COUNSELING .....	173
A. BASELINE CONCERNS FOR CONSTRUCTING TESTS (EXAMINATIONS AND QUIZZES) .....	174
1. <i>Validity</i> .....	175
2. <i>The Call of the Question</i> .....	176
3. <i>Interdependence</i> .....	177
4. <i>Presuppositions About Things not Taught in the Course</i> .....	178
5. <i>Reliability</i> .....	180
6. <i>Fairness</i> .....	181
B. DRAFTING PROBLEMS FOR ESSAY ANSWERS .....	182
C. TAKE-HOME ESSAY TESTS .....	184
D. MULTIPLE-CHOICE EXAMINATIONS (OR QUIZZES) .....	185
E. CONCLUDING CONCERNS .....	187
VI. THE STRUGGLE FOR TIME: BALANCING COMMITMENTS TO TEACHING WITH COMMITMENTS TO FAMILY, SCHOLARSHIP, PUBLIC SERVICE, AND INTELLECTUAL GROWTH .....	188
A. TIME FOR THE FAMILY .....	189
B. THE CHALLENGE OF SCHOLARSHIP .....	190
C. PUBLIC SERVICE AND CITIZENSHIP .....	194
D. STAYING SANE WITH INTELLECTUAL OR ARTISTIC PURSUITS OUTSIDE OF THE LAW .....	195
E. THE CHALLENGE .....	195
VII. CONCLUSION .....	196

## I. INTRODUCTION

The inspiration for this essay is an essay written by Professor Douglas Whaley entitled, *Teaching Law: Advice for the New Professor*.<sup>1</sup> When I got my first job as a law professor in 1987, a professor at my alma mater gave me a copy.<sup>2</sup> It was extremely helpful as I struggled through my early years in teaching. I have shared it in the intervening years with new, as well as seasoned professors. Without fail, recipients have expressed appreciation for the good sense embodied in the essay. Professor Whaley stated bluntly at the beginning of the piece that he lacked any formal training in education, and that in giving advice to new professors, he drew upon his experiences in the classroom and wrote mainly on the basis of his high approval rating by students.<sup>3</sup> In my nineteenth year of teaching law, at the risk of sounding very foolish, didactic, or worse, I have decided to set forth my own reflections on teaching, limiting myself to the teaching of contracts and commercial law courses, though I hope my reflections will resonate with a few professors teaching other subjects. I will write mainly on the basis of classroom experiences at two law schools.<sup>4</sup> However, I have consulted multiple sources as will be evident in the citations.<sup>5</sup>

Professor Whaley was often sought out for advice on teaching and wrote his essay as a time-saver embodying what he generally told new professors. I have served as a mentor to a few new professors, but apart from those relationships, professors have rarely appeared in my office for advice on teaching. Accordingly, my objectives are modest: to summarize and share my reflections about teaching the subjects that I know best in the hope that either a struggling new professor or a seasoned professor searching for a fellow traveler will find affirmation or even fresh insights. Nothing in this essay is highly theoretical. Instead, this essay consists of a

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1. Douglas J. Whaley, *Teaching Law: Advice for the New Professor*, 43 OHIO ST. L.J. 125 (1982).

2. I am grateful to Professor David Day, of the University of South Dakota School of Law, for his early interest in my teaching career.

3. Whaley, *supra* note 1, at 125.

4. Aside from a three-week teaching experience at the University Law School in Bucharest, Romania, in 1993, my teaching experience has been at New England School of Law in Boston, and as a visiting professor for two semesters at Vermont Law School in South Royalton, Vermont.

5. See generally William L. Prosser, *Lighthouse No Good*, 1 J. LEGAL EDUC. 257 (1948) (a classic which preceded Professor Whaley's essay). Professor Whaley cited the Prosser article in his first footnote. Whaley, *supra* note 1, at 125. See also Kent D. Syverud, *Taking Students Seriously: A Guide For New Law Teachers*, 43 J. LEGAL EDUC. 247, 247-48 (1993) (presenting three main "propositions" as a guide for teaching law students). I would recommend them both to any teacher, especially the latter, to which I will refer repeatedly later in this essay.

close-up examination of the tasks involved in the life of a professor. It involves mainly the nitty-gritty of *teaching law*. I will pose a few questions along the way and would be truly delighted if anyone were to respond with thoughts on teaching or other aspects of the life of a law professor. If my essay were to constitute an opening for one or more conversations on life in legal academia, I would count it a success.

I will write informally, generally addressing my intended audience in the second person, using Professor Whaley's organizational themes as an outline and many of his thoughts as starting points for reflection.<sup>6</sup> At many points, I will either expand upon or gently take issue with statements made by Professor Whaley in his essay. While I have never met him, my debt to him is great, quite apart from the impact of his essay on teaching. Through several editions, his casebook on commercial law has served me and hundreds of my students quite well.<sup>7</sup> Wrestling with his problems has enabled me to teach myself a fair amount of commercial law. While I do not concur in every judgment he made in editing his casebooks, I mean to honor him as my distant teacher, even where my line of thinking departs from his. I understand that he is retiring from teaching. May his retirement be enriching. Incidentally, since I value the word "teacher," I will use it interchangeably with "professor" throughout this essay.

## II. PREPARING A COURSE FOR THE FIRST TIME

Course preparation requires three things: learning the subject matter to be covered, choosing instructional materials, and making a plan for the semester. Just as a litigator's success depends as much or more on pre-trial preparation as on skills demonstrated in court, a law teacher's positive impact turns as much on preparation before the course starts and preparation before each session as it does on interpersonal skills or classroom techniques.

### A. LEARNING THE SUBJECT MATTER

It is an awesome undertaking to master an area of law to the point where you "profess" to teach it to others. In the beginning this usually involves something of a sham but don't pretend too much and you will find the task manageable.<sup>8</sup>

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6. I will start a few sub-parts with thoughts from other authors, chiefly Professor Kent Syverud. See Syverud, *supra* note 5, at 247-48.

7. The most recent edition I have used is, DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON COMMERCIAL LAW (8th ed. 2005).

8. Whaley, *supra* note 1, at 128.

Entry into the law teaching profession is built upon two assumptions, which are generally false. The first assumption is that new teachers know the subject matter of the courses assigned. The second is that new teachers will know how to teach. The hiring process sets up a gamble for both sides. There is no pathway to certification for law teaching, nor is there any general objective assessment of subject matter competency before a person is hired to “profess law.”<sup>9</sup> Once you are hired, except for helpful hints from kindly colleagues and constructive criticisms (if you have an honest and insightful mentor), you must make it on your own wits. I am denouncing neither the process nor the results. I was a beneficiary of the process, and subsequently, have served on appointments committees to recruit professors who serve exceedingly well. Yet, the reality is that in the beginning, most newly hired professors need to learn a great deal of law in a short time, and simultaneously, must begin the arduous task of mastering the art of teaching. It is a sink or swim process.

If you are new to the law teaching profession, beware: preparing a course for the first time, if done well, is a very time-consuming task. When I was hired in 1987, I started serious, daily, methodical preparation in early July for two courses scheduled to begin in late August.<sup>10</sup> With that amount of preparation time, I was able to begin teaching with a sense of competence, talk with limited authority on the subject matter, and maintain a sense of dignity. More preparation time might have helped me. Anything less than six or seven weeks of preparation time would probably have led to terrible unease in the classroom or worse. I came from a commercial litigation practice in a small firm in a rural state into law teaching in the city of Boston. Perhaps my origins contributed to my feeling of uneasiness and a felt need for a very substantial pre-semester study for the assigned courses. Yet, I have seen well-educated young men and women, graduates of prestigious law schools, struggle hard to gain a mastery of their assigned subjects. The simple fact is that gaining a J.D. degree, even with the highest honors, signifies that a person has had a good introduction to law and probably is quite adept at learning law and expressing that learning in written exercises under stress—but it signifies little more.

Even if a person has had experience in practice, it has usually consisted of hit-and-run encounters with legal doctrine as necessary to address narrow issues within a tight time frame. I mean not to denigrate experience in

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9. Of course, any responsible appointments committee makes some assessment of scholarly achievements and potential. This often requires a substantive presentation to a faculty gathering.

10. I was assigned to teach contracts and commercial paper. The latter course, since renamed “Negotiable Instruments and Payment Systems,” covered mainly Articles 3 and 4 of the Uniform Commercial Code (U.C.C.).

practice. On the contrary, I think at least a little practice in some setting ought to be a *sine qua non* for law teaching. It seems, however, that even practicing in an elite firm does not necessarily allow a man or woman to gain a sense of the whole of any legal subject matter unless that person has been in the practice for a considerable time and is a person with especially reflective habits of mind. Therefore, a good first step for most instructors taking on a new course, especially for a new professor, is to admit privately to a dearth of understanding of the subject matter. I advise against disclosing this admission, especially to students. An overly self-effacing stance toward colleagues or students serves no good purpose. An admission of relative intellectual emptiness is simply a prelude to making a plan for learning the subject matter, which will take substantial time for most recruits.

Professor Whaley advised, "I suggest you start by reading cover-to-cover the leading treatise in your field, assuming it is not of overwhelming size. Concentrate on history. Knowing how and why the law of your subject reached its present state is the beginning of true knowledge. . . ." <sup>11</sup> I heartily agree with Professor Whaley's stress on reading to understand the development of the law, but I think Professor Whaley, even with his caveat about size, is suggesting too broad a front-end reading assignment for most courses. While I enjoy the great treatises on contracts law, as well treatises on the Uniform Commercial Code (U.C.C.), a straight-through reading of any two major treatises, one for each course, might have swamped me if I had tried to read both in the time allotted before I started teaching. <sup>12</sup> I would counsel any beginner to read selectively in a major treatise, preferably in conjunction with readings in a casebook, since you will probably be trying to make a casebook selection in the same time frame. Casebooks can be great teachers for prospective teachers. The professors who voted to hire you might happily recommend good reference material and be willing to enter into serious conversations on the subject. <sup>13</sup> Before starting any

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11. Whaley, *supra* note 1, at 128.

12. See generally E. ALLAN FARNSWORTH, *CONTRACTS* (4th ed. 2004); JOHN E. MURRAY, JR., *MURRAY ON CONTRACTS* (4th ed. 2001); and JOSEPH M. PERILLO, *CALAMARI AND PERILLO ON CONTRACTS* (5th ed. 2003) (in addition to the revised multi-volume treatises bearing the great names of Corbin and Williston, I find these works are trustworthy references for contract law). See also JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* (5th ed. 2000) (a great treatise to begin with for anyone teaching U.C.C. courses).

13. I will be forever indebted to my colleague Professor Curt Nyquist at New England School of Law. Before I started teaching, I requested something that would summarize the law of negotiable instruments. He wisely recommended *A Negotiable Primer*. ELLEN A. PETERS, *A NEGOTIABLE INSTRUMENTS PRIMER* (2d ed. 1975). Both this resource, now out-of-date, and much coaching from Professor Nyquist enabled me to master the basics of negotiable instruments law in a fairly short time.



U.C.C. course, I would recommend finding at least one source that has challenging problems that will compel you to wrestle intellectually with issues that will come up early in the course.<sup>14</sup> You will need to hone your skills on solving problems and drafting problems as soon as practical. If time permits, reading a couple of good law review articles that are pertinent to early parts of the course will help for either contracts or any U.C.C. course.

When the course commences, a professor ought to, at minimum, be able to envision the *end* of the course in its double meaning; that is, the doctrine on which the course literally will end *and* the objective toward which the course aims.<sup>15</sup> However undertaken, serious work to gain a sense of the subject as a whole and a modicum of confidence in problem-solving will naturally lead to the first concrete actions you need to take; that is, choosing your casebook or other instructional materials and building a syllabus for the semester.

#### B. CHOOSING A CASEBOOK

Bitter experience has taught me—and others confirm this—that until one actually teaches from a book, it is impossible to predict how good a teaching tool it is, so be wary of adopting as your first book the newest, experimental publication on the market. Again, asking around amongst those who have taught the subject for years should produce something of a consensus as to the “best book,” or, if your field is blessed with many happy choices, “best books.”<sup>16</sup>

Before embarking on a course in contracts or the U.C.C., a conscientious teacher might legitimately decide not to use a casebook. The fact that casebooks have been the main instruments of legal education since the days of Professor Christopher Columbus Langdell hardly justifies their use in perpetuity, especially since Professor Langdell’s view of law as science has been universally abandoned.<sup>17</sup> There are other possibilities.<sup>18</sup>

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14. The availability of many problems that drew me into the details of Articles 3 & 4 of the U.C.C. is the main reason for my abiding loyalty to Professor Whaley’s books. Whether you are beginning or seasoned, you will at some point want to spend many hours mining *Uniform Commercial Code* by James J. White and Robert S. Summers. See WHITE & SUMMERS, *supra* note 12 (offering a treatise that succinctly and clearly most often provides a reasonable, authoritative interpretation of texts likely to cause grief to professors, students, and practicing lawyers).

15. Master the basics before the first session or be ready to pay your dues to inquisitive students who find your weaknesses. On my first trip through Secured Transactions in the mid-1990s, I was blessed with very forgiving students.

16. Whaley, *supra* note 1, at 129.

17. See, e.g., Stephen M. Feldman, *The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)*, 54 J. LEGAL EDUC. 471, 475-87 (2004).

For the persons teaching contracts or any U.C.C. course for the first time, however, and especially for a new professor, a *teachable* casebook can be a tremendous asset. All casebooks are manifestly not equal. Some are more teachable than others. A bad choice can break a new professor. A bad choice for a seasoned professor more commonly makes for a stressful ride through the semester and may leave some students disenchanted, if not angry. I have chosen unwisely. In one case, the class turned a little sour partway through the course. Years later, I could discern that some former students remembered their experiences with me as less than satisfactory. A higher mastery of teaching arts would have enabled me to use the books I chose more successfully as pedagogical tools despite their limitations. In any event, I partially salvaged the courses for most of the students who, in good faith, worked things through with me. But, the lesson is clear: to avoid bitter experiences, choose instructional materials as much for *teachability* as for integrity regarding the subject matter.

I realize that the following remarks set me up for a charge of coddling, but the longer I teach, the more I feel that students, especially those in their first year, crave a sense of security and intellectual wholeness. Indeed, smashing false securities is a necessary or at least desirable step in legal education. My impression is that any false securities with which students enter law school are easily dissolved within a few weeks in the normal course and that finding ways to organize their intellectual lives is for most students a necessity for survival and sanity.<sup>19</sup> A readable casebook that also evidences an internal logic can furnish a sense of security and help students to structure their thinking. A good casebook can also give a professor a

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18. A case file approach can no doubt be viable for teaching contracts. From my minimal investigation, I understand that part of a class has citations for cases bearing upon a particular doctrine or sets of doctrines; another part of a class has different cases bearing upon the same doctrines. Cases applied to facts given to the students may tend to pull in opposite directions. I can envision exceptionally lively exchanges, a sense of excitement, and a built-in necessity for students to discover that mechanical decision making will usually not suffice for addressing legal problems. I simply have not garnered the courage to try this. If anyone reading this has, I would appreciate a report on the experience. For U.C.C. courses, I could see moving toward an approach based mainly on problems and textual interpretation, avoiding cases for the most part. I have not gone that route either. However, Professor Whaley's *Cases and Materials on Commercial Law* in all editions has been heavy with problems and hypotheticals, which is one reason I have continued to use it.

19. In contracts, I recently attempted to teach U.C.C. section 2-207 using *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), and *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000) which are placed side by side in the Knapp text. CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW 255-65 (5th ed. 2003). One student told me after class that he and his classmates felt that law school was not serving the purpose they assumed it would serve; they believed law school would teach law in such a way as to provide a sense of stability and certainty. His mere inquiry drove home the point: first-year doctrinal courses illustrate conflict and indeterminacy to a sufficient degree.

sense of security and can provide a basis for a methodical development of the course.<sup>20</sup>

Because I believe the choice of casebooks is very important, I will take the time to suggest factors, in addition to recommendations, that a professor should specifically look for in a casebook. A threshold inquiry is whether or not the book is current. An out-of-date casebook may be a great legal artifact; it is no good as a teaching tool. Given frequent revisions and proposals for revision of the several articles of the U.C.C., and uneven adoptions from state to state, choosing an appropriate commercial law casebook can be challenging. First, figure out which version of the U.C.C. you want to teach (since states have not adopted revised articles at the same pace across the country) and make sure the casebook matches. The same goes for choosing a contracts casebook so long as more than one version of Article 2 is in play. Once that threshold issue is settled, I suggest that there are always several factors to consider in evaluating books and choosing a *teachable* casebook: (1) coverage; (2) case selections; (3) editing; (4) internal logic; (5) materials between the cases; (6) problems; (7) editorial views; and (8) accessible editors, available supplements, and technical considerations.

### 1. Coverage

If you want to cover U.C.C. Article 2 materials in your contracts class, it is problematic if you choose a casebook that gives Article 2 little or no coverage. If you want to cover letters of credit in a course on sales, it is unhelpful to begin with a casebook that leaves out Article 5 and related doctrines, such as documents of title. Casebook coverage does vary.<sup>21</sup> For basic bread and butter courses—and I count U.C.C. courses as basic for

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20. With regard to the case file method or any variation thereon or a strictly problem-solving approach to a U.C.C. course, I wonder whether or not a higher-than-average development of pedagogical skills is required. A good casebook allows the editors to teach to some extent. If a student is diligent, a good casebook may teach much more than the classroom teacher ever could. Having said that, I would not be surprised if in fifteen years, casebooks are the exception, rather than the rule, for teaching contracts and commercial law courses. It makes sense to me that a wide variety of instructional materials might be effective much as using widely differing methods of teaching have been shown to be effective. See Paul F. Teich, *Research on American Case Law Teaching: Is There a Case Against the Case?* 35 J. LEGAL EDUC. 167 (1986). A list of advantages is referenced on page 170, and some negative assessments are found on page 171 in footnote 12. *Id.* at 170, 171 n.12.

21. Constructing a casebook is akin to arranging an exhibition in a museum. One curator might emphasize one theme or artist; another well-qualified curator might give more attention to other themes or artists. A viewer's understanding of an artistic period will be greatly shaped by the selections made. Likewise, a casebook editor, by emphasizing or downplaying doctrinal themes, and by including or excluding cases, creates a lasting impression of what is more important and less important in any doctrinal area.

anyone wanting to do transactional law or commercial litigation—fullness of coverage really counts.<sup>22</sup> In a course on contracts, leaving out any major doctrinal sub-part seems to me to be irresponsible in most settings since contracts is basic for courses that follow and is also basic to understanding business and consumer transactions of any sort.<sup>23</sup>

## 2. *Case Selections*

Most students appreciate and remember a good story. Our case law is a peculiar genre of American literature that embodies many great and memorable stories. Students may soon forget specific concepts and rules, but they will remember cases that convey rich human experiences, and those memories can create a shared database. Given the depth and wealth of our contracts case law—without counting cases from old England—there is no need for any series of cases to be boring. I am not suggesting that a casebook ought to be constructed mainly to amuse students, but a good casebook should contain cases showing diverse persons and conditions that have yielded instructive decisions. In the past few years, I have discerned a tendency for editors to choose relatively recent cases and either to demote old classics to notes or to excise references to them altogether.<sup>24</sup> Admittedly, there is no canon of contract and commercial law cases. Cases of recent vintage are fine, so long as they are not bland and barren of pedagogical power. However, where doctrine is relatively stable, recent vintage should not trump other factors, including human interest.

It is good to have some cases that exhibit especially fine judicial craftsmanship.<sup>25</sup> Yet, cases less well crafted can be instructive also.<sup>26</sup>

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22. I am not writing for someone teaching at an elite law school where breadth of coverage may not be valued or necessary and where depth of philosophical inquiry trumps coverage. Professor Whaley issued a similar caveat. Whaley, *supra* note 1, at 127.

23. Meaningful coverage in any contracts course means covering grounds for promissory liability, statutes of frauds, rules of interpretation, the parol evidence rule, excuses or justifications for non-performance, breach, remedies, third party beneficiary rights, and assignments and delegations. Excise any of the foregoing, and students planning on being lawyers in virtually any setting will be shortchanged.

24. Older casebooks on contracts used one or more of the following cases on post-formation justifications for non-performance. Taylor v. Caldwell, 122 Eng. Rep. 309 (K.B. 1863) (describing the doctrine of impossibility); Krell v. Henry, 2 K.B. 740 (K.B. 1903) (discussing the concept of frustration of purpose); Mineral Park Land Co. v. Howard, 156 P. 458 (Cal. 1916) (explaining the doctrine of commercial impracticability). These cases showed students the origins of doctrines, not merely applications. I doubt that substituting modern variations, especially without explanation of the origins, has necessarily made the study of contract law more enlightening.

25. See, e.g., Mills v. Wyman, 20 Mass. 207 (1825) (written by Chief Justice Parker); James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344 (2nd Cir. 1933) (written by Judge Learned Hand); Drennan v. Star Paving Co., 333 P.2d 757 (Cal. 1958) (written by Justice Roger Traynor). People might quarrel with my assessments, but I count these as examples of great judicial craftsmanship.

Working with a class to interpret a case that is not especially well-written can be worthwhile. Students who become lawyers will work with both well-crafted and not-so-well crafted opinions. Hence, exposure to a variety of opinions is well justified. The casebook, especially for first-year students, should keep them interested and avoid leading them into thinking too much about the law as an abstraction devoid of human stories. Though case selection will be more targeted, and the quarry less rich, in the commercial law areas (assuming we stick with post-U.C.C. case law), the same criteria should generally apply.

### 3. *Editing*

To construct a teachable casebook, editors must take editing seriously; they must be mindful of the casebook's student audience. As a result, many parts of opinions that are not pedagogically valuable (e.g., many dissenting or concurring opinions) must be excised. A casebook editor who neglects to boldly cut these less valuable parts of cases will waste the students' time. I understand that lawyers are careful (or should be) with whole opinions, leaving nothing unexamined that might be pertinent. Excellent case-law reading is reading in depth within a context; at its best, the art requires an understanding of every word.<sup>27</sup> Yet, time is tight in law school. In contracts or U.C.C. classes, there will usually be no point in having students read many pages pertaining to jurisdiction, venue, or an analysis of a tort arising out of a contractual relationship.<sup>28</sup> To some extent, curricular divisions are arbitrary, but we have those divisions for pedagogical reasons.<sup>29</sup> Of course, cutting can go too deep. Responsible editing does not mean leaving only a few selected paragraphs with bracketed editorial comments carrying the bulk of the message. We should be training students to read cases, and not mere explanations of cases. An advantage of using cases is that the judges

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26. See, e.g., *King v. Trs. of Boston Univ.*, 647 N.E.2d 1196 (Mass. 1995) (written by Justice Ruth Abrams); *Syester v. Banta*, 133 N.W.2d 266 (Iowa 1965) (written by Justice Snell). For my students, these cases have proven to be much loved and very interesting. Others may differ, but I have found it time consuming and difficult to ferret out the issues and holdings of these cases, though the stories therein are fascinating.

27. See KARL N. LLWELLYN, *BRAMBLE BUSH* 41-55 (Oceana Publ'ns, Inc. 1977) (suggesting methods on reading case law in law school). I would recommend reading and re-reading those pages in preparation for teaching any course even partly on the basis of case law.

28. I enthusiastically favor recognition and appropriate consideration of procedural points that arise in contract and commercial law cases. I also recognize and value overlaps between contracts and torts and property law. However, it is vital that a casebook focus on the core doctrinal issues that should be covered in a course.

29. At the same time, I sincerely think that teachers, especially of first-year law students, should confer regularly to note overlaps in their subjects. They should discover ways to point out interdependencies. This type of teaching, in turn, will avoid creating a false impression that curricular divisions will somehow govern decisions in practice.

can speak to the students directly. A good editor should facilitate the communication from judges to students. This way, judges can also become teachers. Too much editing is as much a vice as too little.

#### 4. *Internal Logic*

The *order* in which cases are presented is critical. Contracts casebooks tend to begin with either remedies, rules of formation, or the doctrine of consideration. Third-party rights and obligations usually turn up at the end. Different orders have their merits. Commercial law casebooks have a predictable order; they tend to follow the general outline of the U.C.C. articles being covered, though the stress they place on themes may vary greatly. A professor needs to find his or her path into the doctrinal thicket and use a book where the order of things feels right.<sup>30</sup> Constructing a casebook that is truly a good and honest pedagogical tool is a high art. My hunch is that casebooks tend to survive mainly for three reasons: First, the cases are well selected. Second, the casebooks are artfully edited. Third, the materials in the casebook are arranged so that there is a flow that carries the teacher and students from one doctrinal challenge to another in a way that seems sensible. A professor who wants to survive and gain students' respect needs an eye for well-edited casebooks with a discernible inner logic directed toward unfolding layers of doctrinal challenges.

#### 5. *Materials Between the Cases*

A professor needs to consider *what lies between the cases*, and such consideration usually encompasses notes and questions or abbreviated versions of noteworthy cases. I have again and again been surprised by the time and effort that many students, especially those in the first year, will devote to gaining an understanding of the materials between the cases.<sup>31</sup> These references make the casebook more than a mere casebook; it is also a trustworthy research tool for the professor or student who wants to dive

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30. Students will be cooperative in skipping around if the professor is careful and articulates sensible reasons for changing the order in presenting the material from that established by the casebook editors. However, arbitrarily skipping around in a casebook will generate frustration, confusion, and anger on the part of the students.

31. The casebook I am currently using for contracts is the 5th edition of the Knapp text. KNAPP ET AL., *supra* note 19. It has especially fine references between the cases. There are notes and questions that provide background for and questions about the principal cases, summations of parts of legal history, exposure to different schools of jurisprudence, and cross-references to different legal regimes (for example, the Convention on the International Sales of Goods (CISG)). It also explains linkages between different parts of the casebook. Occasionally, there is a lengthy comment that explains a particularly troublesome doctrinal area. See, e.g., *id.* at 753 (delivering a longer excerpt from *Comment: The Doctrine of Constructive Conditions*); *id.* at 1003 (using another lengthy but helpful excerpt from *Comment: Commercial Arbitration*).

deeper. At least a cursory consideration of materials between the cases is worthwhile when you are choosing a casebook, because a well-chosen book can serve as your main means of entry into the subject matter that you are undertaking to teach. A great casebook can help you in your first major challenge, gaining a comprehensive vision of the subject matter you are assigned to teach.

#### 6. *Problems*

A good commercial law course requires challenging and workable problems. Good problems greatly embellish a contracts casebook. Casebooks vary greatly in the number, quality, and usefulness of the problems included. Often, fact patterns in casebook problems are too long, or the issues generated are too esoteric for regular classroom use. If you are problem-oriented (and in commercial law courses you ought to be) either select your casebook with well-drafted problems *central* to your deliberations, or be prepared to draft your own problems. Professor Whaley is a master at drafting provocative problems even though some of his hypothetical characters are a little corny.<sup>32</sup> I have used his problems dozens of times, but I have also discovered that problem-solving in class can be far more rewarding when I draft the problems myself. By having thought carefully to construct the problems themselves, professors reap rewards when they construct problems that challenge students to spot the issues and to use the law to argue for one resolution or another. Therefore, if you are ready for the drafting challenge, you might in good conscience pick a casebook that has few problems (or even none) for either a commercial law or contracts course and make it work out. If you take up the challenge, be ready for surprises: students have an uncanny ability to find flaws with fact patterns and to demonstrate their inconsistency or insufficiency. No matter how carefully drafted, many problems will not survive one serious collective in-class scrutiny. The strength of the book you pick will determine your needs for supplementation; for books strong on problems, I supplement with more cases, and for books strong on cases, I supplement with more problems. While in contracts casebooks more emphasis is placed on cases than on problems, a good course surely requires some in-class problem solving.

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32. See DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON COMMERCIAL LAW 454-98 (7th ed. 2003) (exemplifying excellent problems devoted to issues arising out of U.C.C. Article 3; problems 130 through 148 are particularly well-drafted). For a discussion on the benefits of teaching by the problem method, see the article by Paul Teich. Teich, *supra* note 20, at 172.

### 7. *Editorial Views*

It is scarcely a secret that legal academia is rife with competing slants on legal analysis, meaning that legal texts (especially cases) are selected, edited, read, and analyzed through certain ideological lenses.<sup>33</sup> Given the gravity of societal issues with which the life of the law is inextricably woven, it could not be otherwise without a retreat into an abstract legal formalism.<sup>34</sup> There are editors engaged in critical race studies, feminist critiques of the law, and the development of political and economic models against which the value of cases may be measured. Even if an editor were explicitly to renounce adherence to any particular jurisprudential viewpoint, that editor would select and edit with some criteria in mind, and such criteria would favor some perspectives on the law more than others.<sup>35</sup> One way or another, editors tend to inject a jurisprudential spin into the casebooks. This is nothing necessarily negative, merely something of which to be aware. I am not arguing for avoiding casebooks that advance any particular viewpoint about the law. Rather, I am simply suggesting that in choosing books you should keep an eye out for any viewpoint being advanced by the editors and make sure that your viewpoint is not strikingly in conflict; unless, of course, you want to teach *against* the editors rather than in concert with them which is a tricky business.

### 8. *Accessible Editors, Available Supplements, and Technical Considerations*

It is a benefit if one or more editors will cordially answer an e-mail or return a phone call while you are considering a casebook, and even better if one will volunteer to be a resource in the future. I have found that open channels of communication with casebook editors can be helpful. I have

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33. Whether the editors intend it or not, great casebooks may carry messages that are controversial. See Mary Joe Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985) (examining the selection and treatment of cases from a feminist vantage point). For a great example of a casebook edited and supplemented from a feminist perspective, see *Contracting Law*. AMY H. KASTELY ET AL., CONTRACTING LAW (Carolina Academic Press 1996). I used this casebook with some success, but there was a definite difference in degrees of appreciation partly based on the gender of the students evaluating the book.

34. See GRANT GILMORE, THE AGES OF AMERICAN LAW 41-67 (Yale Univ. Press 1977) (analyzing the downside of excessive formalism and arguing that a retreat would assuredly impoverish legal education and ultimately the life of the law).

35. KNAPP ET AL., *supra* note 19. To their credit, I think authors Charles L. Knapp, Nathan M. Crystal, and Harry G. Prince give due deference to many perspectives without denigrating any particular view. I continue to use the book for many reasons, one being the feeling that a plurality of views in contract law is respected and that there is no underlying attempt to rip law loose from its historical moorings.



tried never to abuse the privilege, and I suspect good editors appreciate a conversation on a point of doctrine or pedagogy, even if it is challenging.

A teacher new to the course might legitimately consider technical points of a casebook,<sup>36</sup> as well as the statutory supplements published for use in conjunction with the chosen casebook. A good statutory supplement will save time and grief. In summary, choose your casebook with care. A wisely chosen book can become a great friend for many years, as comfortable and familiar as a favorite old article of clothing.<sup>37</sup> A book improv-idently chosen can make your professional life miserable.

### C. BUILDING A SYLLABUS

Students are grateful for all of the advance warning that they receive on course format, so take the time to clear up which texts are required, your attitudes on preparation, participation, and the proposed nature of the final exam. An overview of the subject is in order, as are guidance on the importance of the course (your “goal”) and a list of useful library references, which you are well advised to have placed on reserve. If you wish to cover a segment of the book in the first class, post an assignment on the designated bulletin board well in advance of class.<sup>38</sup>

Institutional practices and student expectations have changed significantly since Professor Whaley wrote those words more than twenty years ago. Indeed, during my student days, it was common for professors to give a *rolling assignment*, e.g., stay thirty pages ahead of class discussion. Beyond that, we knew little about what to expect with the exception of those professorial expectations which students from prior years decided to share. I applaud Professor Whaley for his insistence on disclosing expectations and giving a course outline in reasonable detail on the first day. However, in the intervening years, a student expectation has arisen that the professor will provide a preview of the course in a syllabus well in advance

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36. Technical points that enhance the usefulness of a casebook include a good index, a complete table of cases cited, a complete table of statutes and secondary authorities cited, and even a decent cover. I would not recommend choosing any book for its cover, but given the price, one would hope for books constructed to last. I wish casebooks had ribbons like old Anglican prayer books for keeping one's place, but I do not discern any movement in that direction.

37. On one point, I take issue with Professor Whaley. In his essay, he advised, “Switch casebooks after you have taught the course twice, and you will see the course from a different perspective, growing from the experience.” Whaley, *supra* note 1, at 128. I do not doubt switching casebooks makes for growth; I've done it more than enough. But, unless your first choice was a bad one for you, I would say stick with a casebook for three or four runs at a minimum. It takes time to appreciate the logic and depth of most really good casebooks.

38. *Id.* at 129. Professor Whaley was suggesting points to cover in the opening session. *Id.*

of the first day, and every professor I know more or less complies.<sup>39</sup> With the advent of computer technology, the expectation is that syllabi will be put on the school website within a reasonable time in advance of the commencement of the course.<sup>40</sup> My syllabi have grown considerably in length and exactitude over the years. The question arises: What ought to be in a course syllabus? Bearing in mind that constructing a syllabus is as idiosyncratic as teaching, I consider the following subject matter essential: reading assignments in the casebook for the semester, collateral reading assignments, rules for the classroom, the professor's expectations of the students, at least minimal revelations about testing and grading, and information about how students may contact the professor in a manner reasonably convenient for the students. While I do not think it essential, I typically add three other features that are constantly evolving: a list of my objectives in the course, a bibliography of secondary materials, and a clear statement about the importance of ethics in law school and lawyering.

### 1. *Assignments in the Casebook*

Students appreciate knowing well in advance where you intend to be in the casebook as the semester unwinds. It is sufficient to set forth assigned pages; however, I have found it helpful to list on the syllabus the cases to be covered in the assigned pages with a few questions following each case citation. A few well-phrased questions can guide the students' reading.<sup>41</sup> One hazard of assigning cases for the whole of the semester is that this practice can generate ill feelings if you fall seriously behind. If you fall behind, students will immediately begin to ask whether or not you intend to cover the material specified on the syllabus in the next session. You need to have an honest answer. Early on, I tended to glorify falling behind in the sincere belief that I was generating in-depth involvement that was a worthy substitute for coverage. On reflection, my justifications for going off course were usually self-serving. When I have fallen behind, I have nearly always been able to discover a mistake in my preparation of the syllabus or a failure in preparation for the session where I first fell behind. While failing to follow the syllabus with care is not necessarily a moral failing, it is usually a bad policy. If a professor stays current or close to current on

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39. At least that has been my experience. There may be some variance in different regions.

40. Writing this in July 2006, I already feel the gentle but firm pressure from students and administrators to put up my syllabi for courses beginning the last week of August. While at first this seems a little irksome, I think the pressure to publish syllabi well in advance of the start date for a course is very energizing.

41. Adding questions also gives the professor a chance to invite probes into a case for points that otherwise would almost certainly have been passed over lightly.

materials assigned, student frustrations will be far fewer than otherwise. Hence, be careful when setting out assignments in the syllabus. Often, building a syllabus sensibly requires deleting something from a casebook.

Divisions between daily reading assignments should make sense. While some sessions necessarily must be bridges from one topic to another, splitting daily assignments between topics is highly desirable. If the conceptual lines between sessions are clear, introductory and closing remarks, as well as questions and problems, can be more focused than is possible if multiple topics are commingled. While life is messy, and any lawyer needs to learn to deal with the messiness of facts and collisions of multiple doctrines in solving problems, *for pedagogical purposes* (especially during the first year) clean topical divisions will help many struggling students make sense of subject matter that might otherwise befuddle them. As the course moves on, linkages from one doctrine to another can be developed. Multiple doctrines can be brought into play in solving complex problems. I only advise to avoid unnecessary complications when students are beginning to learn various doctrinal areas.

## 2. *Assignments or Recommendations of Collateral Reading Material*

Students in law schools today tend to be incredibly busy. Wanting to be merciful, a professor might logically elect to confine required reading to a casebook, offering extraneous materials by comments or handouts in class. I have done that and usually have regretted it. It is generally better in contracts and commercial law courses to avoid distribution of reams of paper during the course and to recommend a manageable treatise or hornbook. If you intend to hold students responsible for understanding any material in any sources outside of the casebook, simple fairness demands that the students have reasonable notice of the material assigned and when they ought be studying it. If you want your students to be responsible for any cases or articles outside of the casebook, like cases on current issues or articles of special interest, make sure they have copies or citations *as early as practical* in the semester, preferably in the syllabus. Students will not take kindly to any surprise directives, especially if the directives take them out of their ordinary routines, or even worse, if obstacles to obtaining the materials arise or time constraints preclude some persons from gaining meaningful access. If you know in advance exactly what you will use for supplementary material beyond a treatise or hornbook, it is prudent to have it bound and distributed when students purchase their casebooks.

### 3. *Rules for the Classroom*

Without a doubt, every law school has student rules or regulations, often bound in a student handbook. In the midst of heavier reading, a professor may be tempted to cast aside anything as mundane as a student handbook, but being unfamiliar with the rules that bind the students is no virtue.<sup>42</sup> A matter of prime importance that should be disclosed in advance is your rule, if any, on class attendance. At New England School of Law, we have an attendance policy that accords with the A.B.A. Standard pertaining to attendance. For each session, I use a roster produced by the Registrar's office for signing in. Obviously, this requires a reminder in the first session or two, but the reminder can be exceedingly brief if the attendance rule is set forth clearly in the syllabus. Further, students ought to know your policy on matters that may seem picky or trivial but are important: when questions in class are appropriate, and when they are not; whether coffee mugs are allowed in class; when cell phones must be turned off;<sup>43</sup> whether tape recorders are allowed; and whether you want a phone call or an e-mail if a student needs to miss class for a good reason.<sup>44</sup> The risk of giving offense or creating unpleasantness is greatly reduced if institutional rules and their application to your class are understood at the beginning.

Beyond rules required by the school, in the zone where professors have the liberty to make rules of their own, rules should be very few. In that respect, I am a minimalist and a libertarian of sorts. Fewer rules mean fewer infractions. Fewer infractions mean reduced enforcement obligations. I shy away from such obligations, as do many others. I believe it is

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42. If you are familiar with the institutional rules, then you can simply cite students in your syllabus to the pertinent rules, if any, bearing upon your class and avoid any possible clash between your policies and institutional policies (for example, who decides what constitutes valid excuses that justify re-scheduling a quiz and who can excuse attendance).

43. I highly recommend a rule mandating cell phones be turned off in all classes. Cell phones in class may occasionally generate humor, but repeated noises indicating calls will soon sour everyone.

44. Specificity in your syllabus can be helpful if the student rules are general. For example, The New England School of Law Student Handbook (Rules and Regulations 2005-2006) provides the following general rule:

Conduct that disrupts or impairs school activities or operations may be subject to disciplinary action. The kind of conduct referred to is conduct that by itself or in conjunction with the conduct of others disrupts or impairs the effective carrying on of the activity, a result that the student knew or reasonably should have known would occur.

See NEW ENGLAND SCHOOL OF LAW STUDENT HANDBOOK 32 (2005-2006) available at [www.nesl.edu](http://www.nesl.edu) (providing Rule E.I.b.). A syllabus that articulates a few discrete rules consistent with the school's general standards can be helpful to the professor and the students in creating commonly accepted expectations.

prudent to avoid making any rules against any expression so long that it is not abusive of persons, destructive, or unusually distracting. Rather, I think it is best to state as a gentle but firm admonition in the syllabus to be reiterated in class: (1) Respect each and every member of the class, both in class and out of class; and (2) do not use words in a manner that carelessly, or worse yet, by calculation, may hurt any person on account of race, ethnic origin, gender, sexual orientation, or personal characteristics. Some readers will count such a statement as a preemptive strike against free expression. I doubt such a statement chills free expression, especially if the syllabus also makes clear that diverse persons and views are welcomed.<sup>45</sup> In this context, if the school has a written policy against sexual harassment, it is sensible to make reference to it in the syllabus. I look upon each class as a transitory mini-society of reasonably intelligent persons who will need governance, but commonly very little governance, to work together in peace and with good cheer and high energy. A few baseline rules and a good tone can help make a class into a peaceable and trusting little community. Stating baseline rules in the syllabus is a good first step.

#### 4. *The Professor's Expectation of the Students*

This part could be folded into the rules for the classroom, and there is some overlap, but I prefer on the syllabus to list rules and expectations separately, the latter being aspirations rather than norms that can always be insisted upon. I usually state my expectations in simple terms: come to class, come on time, and come prepared. My *expectations* of attendance far outrun our institutional rule on attendance. While students under our attendance rule may miss up to six sessions in a course that meets twenty-eight times without offending the rule, my expectation is that nobody will miss any class except for personal and compelling reasons. Making clear on the syllabus that your expectations of attendance are far loftier than the rule's requirements helps to set a serious tone, meaning the professor really thinks his or her work is worthwhile and really wants students to be involved.<sup>46</sup> The expectation that students will *come on time* seems reasonable, as repeated late arrivals can be uncommonly disruptive, but I learned the hard

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45. I commonly advise a class in a couple of sentences that if anybody feels inhibited in class about speaking out on any subject of concern, that this person should contact me and arrange for either an e-mail exchange or private conference.

46. If someone misses more than two classes, I have discovered that a friendly and inquiring phone call works wonders. If students know you are counting on their presence, missing class becomes less appealing.

way to be tolerant of late arrivals in some contexts.<sup>47</sup> Good faith and good sense are superior to rigidity. I tell students on the syllabus that I expect them to *come prepared*. Dealing with a self-evidently unprepared student is a challenge that I will take up later in this essay, but up front, I try to negate any sense that *cynicism* about law school and its obligations is acceptable. Cynicism about law and learning law is poisonous. Teaching and studying law can be enjoyable, but both roles embody serious obligations. If cynicism grows, it undercuts the meaning of your work in the classroom. Establishing expectations that embody your values in the syllabus is a step to setting the right tone. A healthy academic culture in any classroom or law school does not automatically arise. It comes through an articulation of values, and on rarest necessity, chastisement of those of who offend in a significant way.

### 5. *Disclosures about Testing and Grading*

For me, talking with a student about testing and grading is like to talking to a client about fees. I would, instinctively, rather serve a client without mentioning money, hoping to get paid at the end. Similarly, I would rather teach students as well as I can without mentioning examinations and grades, hoping that students will perform well and maybe even enjoy my final examination. Just as avoiding a discussion of fees with a client is a major error, avoiding any mention of testing and grading in your syllabus is an undesirable strategy. There is no long-term benefit from keeping students in the dark about your testing and grading procedures. To most students, grades do matter. Grades bear upon getting clerkships, jobs in firms, jobs in government, and admission to LL.M. programs.<sup>48</sup> We who teach delude ourselves if we downplay the importance of testing and grading. Clear, honest, and reasonable disclosures about testing and grading in the syllabus create confidence that the professor has a system, that

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47. I was teaching a contracts class with over one hundred students that started at 9:00 a.m. A few students habitually began straggling in a few minutes late to the annoyance of others, so I expressed my concern and elicited a commitment to arrive a few minutes early for the next session. At the beginning of the next session about a dozen were missing, and they trooped in together at 9:10. Perhaps, feelingly insecure and sensing (wrongfully) some sort of insurrection, I improvidently expressed disgust at their disregard of my expectations. One student of mature years after class came forward and explained that the Green Line (the subway line that the dozen students took to school) had shut down, and all of them trying in good faith to be early, were simply stranded many blocks from school. Needless to say, an apology was in order in the next session. Ever after, I have simply asked for good faith efforts. I have heard that some professors literally lock the doors at the appointed starting time, a practice which I really cannot appreciate.

48. I truly believe that a professor should always affirm the value and prospects of the students who come through law school, evidencing only minimum competency as opposed to excellence, but that concept does not imply that low marks should be applauded, as that tends to undercut the value of achievement in law school.

the system is rational, and that grades will not be arbitrarily awarded. Notice can make any system more palatable. Students should know whether they will be evaluated through written essays, multiple-choice examinations, writing papers, performance in class, or a combination thereof. If practical, a professor should, at the beginning, disclose a plan for evaluation for the whole course showing the percentages or points allotted to various means of evaluation.

#### 6. *A Statement of Objectives for the Course*

I was, at first, afraid to state objectives for my courses. I once quizzed a preeminent professor of contracts law about this; he doubted the necessity or advisability of doing so. Yet, as the years have passed, I feel comfortable reflecting upon and reminding myself of what I am trying accomplish, and I feel that it is sensible to share my objectives with students, with whom I am trying to accomplish those objectives.<sup>49</sup> My list has evolved from year to year and currently includes more than a dozen objectives, three of which are to enable the students (1) to gain rudimentary skills in using concepts and rules of contract law to solve problems akin to real world problems; (2) to gain a sense of the history of contract law, including its roots in English law and equity; and (3) to gain confidence in evaluating rules of contract law by bringing moral, political, and economic arguments to bear upon them.

I stress that the list of objectives is not exhaustive because diligent students will learn more than I ever intend to teach; therefore, my stated objectives should never be viewed as confining or limiting. Moreover, I advise that every student needs to *own the course*, meaning that the achievement of any objective is dependent upon students assuming a high level of personal responsibility which may, in the best of cases, involve setting personal objectives beyond passing.

#### 7. *A Statement about Teaching Ethics*

At New England School of Law, the faculty by resolution has required the pervasive teaching of ethics.<sup>50</sup> This need not be explained in detail on

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49. I have gained a little encouragement from Professor Whaley's advice for the first class session where he, in relevant part, stated, "[a]n overview of the subject is in order, as [is] guidance on the importance of the course (your 'goal')." Whaley, *supra* note 1, at 129.

50. Our resolution requires "that at least one substantial exercise in either legal practice skills or legal ethics be integrated each semester into Civil Procedure, Contracts, and Property." This requirement was adopted by the faculty in the Spring of 2001 for implementation beginning in the 2001-2002 academic year. It was adopted from a Curriculum Committee recommendation and is reflected in the faculty minutes, which are not published nor distributed beyond the faculty and

the syllabus, but I think it is useful to advise pointedly on the syllabus that the law faculty takes ethics seriously, and that some work on legal ethics will be an integral part of the course. By making a straightforward statement about the importance of legal ethics on the syllabus, a professor can extinguish any notion that there has been an amicable divorce between law practice and ethics, or that lawyers are solely hired guns retained for whatever whims a client may want to pursue. This *may* help to counter early on a societal tendency to think of lawyers as either immoral or amoral; the substantive part of ethics comes later in the first semester.

### 8. *Bibliography of Secondary Sources*

My first experience of receiving an extensive bibliography of secondary sources on a syllabus was in a class on negotiable instruments and payment systems taught by Donald Rapson Esq., an adjunct professor at N.Y.U. in the early 1980s. I found this bibliography so helpful that I carried it with me into practice and retained it and found it useful when I started teaching. Seize a privilege of serving in legal academia; namely, that you will have a chance to build up your list of secondary sources and can acquire with relative ease your own library of favorites. Then, share your list of secondary sources with students, providing a few descriptive lines pertaining to each item, thereby guiding students who might want to sample these secondary sources in law school or later. This list of secondary authorities on the syllabus strengthens students' impressions about the importance of the course and your own interest in the subject matter.<sup>51</sup>

### 9. *Contact Information*

Students should be encouraged to ask questions, in class and out, about doctrinal matters and policies, and also about assignments, due dates, rules for papers and examinations, and dozens of unexpected things that turn up during a course. Students should also have open channels through which they can report a death in the family, injury or illness, or any other factors that impede their attendance or interfere with their course work. Therefore, a professor should provide contact information and office hours on the

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administration. Anyone interested may contact the author or the New England School of Law administration for further clarification or follow up on the implementation of the resolution.

A substantial exercise is considered to be the equivalent of one class hour, although materials on practice skills or ethics issues could be presented over several class periods. I have accomplished my obligation to teach ethics in my contracts classes by writing problems as spin-offs of cases in my casebooks and requiring written answers anchored in the rules of professional responsibility adopted by the states which students elect as their chosen jurisdictions.

51. Professor Whaley advised professors to provide of list of useful library references on the first day of class, and to place them on reserve. Whaley, *supra* note 1, at 129.



syllabus. I prefer e-mail and advise students accordingly. As to office hours, figure on four to six hours per week as a minimum if you have first year students, though the hours will remain mainly empty at the beginning of a course. Being available without requiring students to cross intimidating barriers or to guess at times of availability or acceptable methods of communication will enable you to be received as a professor who is willing to work with students, not merely as a scholar who deems students as impediments to an intellectual life.<sup>52</sup>

### III. PREPARING FOR THE FIRST DAY IN CLASS (AND FOR EACH SESSION THAT FOLLOWS)

As far as getting ready for each class, remember this truism: the success of a class is directly proportional to the amount of time spent in preparation for it. In the beginning you will doubtless over prepare, but that won't hurt you a bit since little of this knowledge is wasted. After a while you will begin to develop a sense of the time necessary for adequate preparation, and you should fall into a professional rhythm that suits you nicely.<sup>53</sup>

Sound preparation enhances your chances that your efforts to teach will stimulate learning. Serious preparation is the only way to make teaching truly enjoyable. Assuming an able and willing teacher, what ought to be done for classroom preparation? I suggest three things: (1) an in-depth understanding of the assigned reading and appropriate supplementary sources; (2) an understanding of the students and the questions they will have in mind; and (3) a strategy for use of classroom time. Let any day-dreams about teaching without preparing thoroughly for each session drift into oblivion. The unprepared teacher is no longer legitimately professing law and will be found out.

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52. I subscribe to the attitude manifested by Professor Kent Syverud. Professor Syverud wrote:

One day early in my teaching career a distinguished visiting professor plopped himself down with disgust in my office while observing, "I didn't get a lick of work done today." I asked why. He answered that his office hours were mobbed: "The students wanted everything under the sun—questions about my lectures, about course selection, about clerkships, about lawyering, about life. I didn't get a word written on my article." My unspoken reply was this: "Gee, it sounds to me like you got more work done today than in your last *three* articles. I thought giving advice to students about those things *was* our work and indeed was among the most important work we do."

Syverud, *supra* note 5, at 253.

53. Whaley, *supra* note 1, at 130.

A. MASTERY OF THE ASSIGNED READING (AND APPROPRIATE SUPPLEMENTARY SOURCES)

Methods of mastery differ, but no professor can responsibly go before a class without a reasonable mastery of material assigned to the students. Severely pressed, I have gone to class with less than responsible preparation, but I have done it rarely and have always felt shabby about it. Assuming you will be using cases that day, you should know and remember the details of each case as if it arose from a matter affecting your own family. Similarly, the main words of applicable statutes should become easy and familiar, though never memorized, since you will want to instill the habit of always following the exact wording of statutes.

1. *Mastering the Principal Cases Assigned*

Mastering cases is an idiosyncratic art. Briefing cases in a traditional manner in longhand or on a word processor may help. For me, some manner of written dissection is nearly always necessary to master an opinion of any complexity. Since my handwriting is sloppy, and I tend to read *imaginatively*,<sup>54</sup> I make a handwritten list of facts, issues, and points of law that I want to remember for the class session. Foregoing an intense study of the facts or the procedural history of a case is a perilous business. Students will commonly sniff out any lack of understanding. I try to memorize the material facts of the story embodied in each case, including the names of the main actors, and if practical, dates recorded in the case report that are important for understanding the sequence of events that gave rise to the litigation. Naturally, it is important to have clearly in mind the issues presented, the holdings, and the reasoning and authorities that a court used to justify a decision. Depending upon density, it may be desirable to make notes of a few major points as reminders, and to note pages where important facts, issues, or other matters are reported in the casebook. It is very desirable if the professor is able to enter into dialogue in reasonable depth and detail on every principal case assigned *without resorting to notes*. Referring to notes is preferable to stating untruths, but reference to notes invariably causes students' attention to lapse momentarily, and this tends to break the lines of communication and undermines concentration.<sup>55</sup>

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54. By reading imaginatively, I mean putting oneself into positions of the people in litigation, including their pre-litigation situations in life. Even though this involves, at times, some inferences which might not wholly bear out on investigation, reading to understand the human dimension of the case makes it a story to own and remember, a part of one's mental life, in a way that blackletter law cannot be.

55. I am assuming a teaching method other than pure lecture.

Therefore, master the cases as well as reasonably possible in advance of any session.

Mastering the cases increases student confidence in the professor and greatly enhances the professor's pleasure in teaching. Virtually every case arises from a situation where someone has suffered an injury, economic or otherwise, or at least a feeling of injustice. The deeper a professor knows a case, the more he or she can imaginatively walk in the shoes of the litigants and their lawyers, and understand the humanity that lurks within the case report. True, it is important to impart a system for briefing a case and to sharpen analytical skills. I nevertheless think that *briefing* can easily become all too mechanical. Judicial opinions are a peculiar strand of legal literature written for our instruction, which in some cases rise to the level of very good literature. Cases rightly read can affect readers powerfully; hence, I would never underestimate the effect that a good opinion can have on a discerning student. Neither would I ever assume that during a second or third trip through a casebook a mere brushing up will do. Taking a fresh look every year yields insights and increases the teacher's enjoyment of the case.

## 2. *Reading Behind the Principal Cases*

I cannot imagine anyone with any experience in teaching seriously suggesting that a new professor prepare in the normal course by a thorough second level of reading; that is, reading each of the cases cited in the principal cases as authoritative or persuasive for the decisions. The weight of the task would break any normal person or speedily sour that person on teaching. Neither is such depth of exploration always necessary, but *selectively* reading authorities relied upon or distinguished in principal cases is confidence-building and usually increases insight into the principal case.<sup>56</sup> Understanding prior case law where a new doctrine is developed or adopted helps to provide a feeling of wholeness. Aside from gaining a grip on the development of doctrine, such reading furnishes a professor with multiple fact patterns surrounding a doctrine, making it easier to take questions or

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56. For example, my current contracts casebook of choice contains *Dodson v. Shrader*, 824 S.W.2d 545 (Tenn. 1992). Including this case helps to instruct students on the majority and minority rules respecting an infant's obligation to make restitution for the use of goods or loss of value due to damage to the goods before rescission by the infant. The *Dodson* court discussed a famous Wisconsin case, *Halbman v. Lemke*, 298 N.W.2d 562 (Wis. 1980), which affirmed the traditional rule that no restitution by the infant is required except tender of the good itself in whatever condition it is. *Dodson*, 824 S.W.2d at 547 (citing *Halbman*, 298 N.W.2d at 564). Of course, anybody could teach *Dodson* without reading and understanding *Halbman*, but I would feel impoverished to do that. So it goes for many, many cases. Reading the precedents, whether binding or persuasive, contextualizes the principal case.

construct hypothetical situations when this seems pedagogically useful. Many examples will arise in every casebook where deeper reading will illuminate principal cases, even if there is no change in doctrine.<sup>57</sup>

There is a sense in which any major case can be a gateway to a narrow slice of legal history. In recent years I have tried each semester to read deeper to see what lies behind more and more cases collected in my casebooks. If the authorities are not too lengthy, I print and save them in a file matching the principal case. It is a very simple discipline, hard to keep up under the pressure of many other responsibilities, but my experience has been that deep reading behind the principal cases is generally more useful than are teachers' manuals, nutshells, and the like. My only regret is that I did not do this more systematically in the beginning. Everything one learns by this discipline need not be shared. It simply becomes a reservoir from which to draw in future sessions.

### 3. *Law Review Articles*

Professor Whaley advised, "As you prepare for each individual class, try to find time to read at least one good law review article on the topic of the day. If you repeat this practice each time you repeat the course, you will acquire an impressive body of knowledge very quickly. . . ."<sup>58</sup> I have little doubt about the truth of Professor Whaley's prediction, if any person can follow his suggestion, but I have never been able to keep that pace.<sup>59</sup> Yet, the articles available on virtually any part of the U.C.C. or the common law of contract, often cited in the great casebooks, are treasures of enormous value, bursting with possibilities for classroom application. To wholly bypass the articles that have been written in any discipline is a pathway to impoverishment and disappointment with the profession. Building up a reserve of sound and easily retrievable law review articles

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57. See, e.g., *King v. Trs. of Boston Univ.*, 647 N.E.2d 1196 (Mass. 1995) (citing and discussing early 19th century cases on consideration); *Dodson v. Shrader*, 824 S.W.2d 545 (Tenn. 1992) (citing early case law allowing an infant to rescind a contract without liability for use of goods or damage to goods returned); *Bazak Int'l Corp. v. Mast Indus., Inc.*, 535 N.E.2d 633 (N.Y. 1989) (citing prior case law contrary to the rule adopted for establishing the requisites for confirmatory memoranda under U.C.C. § 2-201(2)).

58. Whaley, *supra* note 1, at 128.

59. If you choose hard articles, Professor Whaley's prescription of an article for every class preparation is too brisk for me. See Mark B. Wessman, *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713 (1996) (demonstrating a well-written article recommended by the editors of KNAPP ET AL., *supra* note 19). Wessman's article is 132 pages long. I am not complaining about its length, but I will carry it in my book bag at least a couple of weeks before finishing it.

that parallel chapters of a casebook is worthwhile.<sup>60</sup> It is truly a shame to elect law teaching as a profession and then to avoid any acquaintance with the most diligent scholars who have labored in the area where you are teaching. Many of us would do well to write a little less and seriously read a little more of what colleagues past and present have labored to put in print. But if you deepen your understanding through disciplined reading, do not feel obliged to share every insight with your classes. Deep learning is best lightly worn, even hidden, while you slug away to introduce students to the most elementary concepts and rules in contracts and commercial law. Your enhanced understanding will be your private confidence-builder when you take questions and make up examinations.

#### 4. *Treatises*

Whether one should read a treatise parallel to the casebook throughout the semester or only consult treatises when questions arise is something I have never resolved. I mainly use the treatises when a dispute arises in class or when my mastery of an area is uncertain. A good treatise can quickly help to close a gap in a teacher's understanding, or to flesh out the details of some doctrinal area, or can serve as a source of good examples for a doctrine's application. However, except for the especially challenging parts of the U.C.C., I have not found that session-by-session reading in a treatise on doctrines running parallel to a casebook is necessary, even if the treatise is deemed authoritative. Since time is always tight, given a choice of re-reading relevant parts of a treatise or using time to dig deeper into old cases or law review articles, I would elect the latter. Perhaps it is a fondness for the history of doctrines or for finding a theoretical angle on legal issues; for whatever reason, articles and old case law help me.

#### 5. *The Restatements*

The Restatements get mixed reviews from scholars. Whether the legal academic community gravitates toward them or not, the Restatement (Second) Contracts and the Restatement of the Law of Restitution are often cited—the former much more frequently than the latter. Depending upon the topic under consideration, it may be advisable to study pertinent Restatement sections even if they will not be the subject of discussion in class.<sup>61</sup> I tend to stress some sections of the Restatements when the

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60. I prefer articles to be printed and bound. New teachers may be happy to read online, but there is something stimulating about having the articles in print and at hand.

61. I also urge anyone teaching Article 2 to consult the Restatement (Third) of Torts for use when teaching warranty cases involving wrongful death, personal injury, or damage to property.

assigned cases can be correlated or contrasted with those sections in which case the comments and illustrations in the applicable Restatement sections are essential reading.<sup>62</sup> For example, when covering U.C.C. sections 2-201 through 2-210, whether in contracts or sales, many sections from the Restatement (Second) of Contracts can be blended, and, in my view, ought to be blended in order to maximize student understanding of the concepts and rules under study. Likewise, when working through buyers' and sellers' remedies in Part 7 of Article 2, references to Restatement (Second) of Contracts can flesh out the meaning of the U.C.C. sections.<sup>63</sup> To give students a practical twist to their legal education, and to teach the art of *blending* statutory law and the Restatements, I urge a new professor to never sneer at the Restatements as overly bland statements of blackletter law; rather, consider consistent study of the Restatements to be a meritorious aspect of preparation for most contracts sessions and many U.C.C. sessions.

#### 6. *Preparing to Teach Statutory Sections*

For serious Code scholars, leaving the study of the U.C.C. text this far down the list in any discussion about class preparation may be obnoxious, even insulting and irresponsible. You may simply assume the best comes last. *When* you dive into the text of the Code in preparation for class and *how much time* you spend on any given section depends upon the course you are teaching, upon your approach to learning and teaching statutory law, and upon your prior mastery of relevant parts of the Code. If you are

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Especially helpful are the Restatement (Third) of Torts: Products Liability sections 1-8. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1-8 (1998) (covering liability rules applicable to products generally and rules applicable to special products and product markets). Warranty cases under U.C.C. sections 2-313, 2-314, and 2-315 may, in those cases, also be pled as tort cases. Likewise, the Restatement (Third) of Law of Suretyship and Guaranty is very helpful when teaching U.C.C. section 3-419 on instruments signed for accommodation. *See, e.g.*, RESTATEMENT (THIRD) OF LAW OF SURETYSHIP AND GUARANTY § 83 (1996) (creating suretyship); RESTATEMENT (THIRD) OF LAW OF SURETYSHIP AND GUARANTY § 128 (1996) (explaining effect on surety when there is a modification of the principal's obligation); RESTATEMENT (THIRD) OF LAW OF SURETYSHIP AND GUARANTY § 129 (1996) (explaining effect on surety when the principal obligor is granted an extension of time for performance); RESTATEMENT (THIRD) OF LAW OF SURETYSHIP AND GUARANTY § 130 (1996) (explaining the effect of a creditor's failure to enforce a claim against a principal). Article 3's rules for accommodation parties are not intelligible without some understanding of the basic suretyship principles enunciated in the foregoing sections.

62. While some scholars have evidenced a disparaging view of the Restatements as being unhelpful blackletter law or worse, courts do cite and rely upon many sections of the Restatements. Further, the language and concepts of the Restatements are part of our legal culture, and, therefore, students ought to be given a meaningful exposure to them.

63. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 344, 356 (1981) (discussing interests protected and liquidated damages respectively).

teaching contracts and the material assigned for the day includes options, you will need to review U.C.C. section 2-205 and its comments.<sup>64</sup> If you have mastered that section, a re-reading should only take a couple of minutes before class. Spending substantial time on it would be foolish.

On the other hand, if you are teaching priorities sections of Article 9 or warranties on instruments under Article 3, unless you have a high level of expertise, *the texts of those sections and their official comments* should be up-front in any preparatory work, usually ahead of any reading and analysis of case law applying those sections. If any challenging Code sections are the special focus of a classroom session, then understanding those Code sections should run ahead of (or at least equal to) time given to principal cases. While I would *never recommend that any teacher memorize or even purport to memorize statutory language*, a reasonably deep familiarity with the text, and, as time permits, familiarity with the comments is very important.

My own tendency for many years was to prepare to teach Code law in a backwards fashion. I studied cases and commentary and belatedly burrowed into the textual language hoping to find the law that I had learned on the outside. Having a treatise handy helped me, especially where Code language seemed ambiguous or opaque. Although I have enjoyed the Code since my first encounter in law school, after thirty years of studying it off and on, I have only recently begun to develop a more satisfying *method* for studying Code sections, avoiding an immediate rush for refuge in a commentary.<sup>65</sup> The positive law enacted by the legislatures binds us, and I have a hunch that we ought to teach *Code language* as well as or better than we teach case law. Yet, I never learned the art of interpreting a U.C.C. section in school as I learned the art of briefing a case; consequently, I have struggled to develop a method for learning and teaching Code sections apart from ferreting out their application in cases.

I have become intrigued by the method employed in a sales casebook edited by Professors Chomsky and Kunz<sup>66</sup> where they designate a “Seven-Step Method For Learning a Statute”<sup>67</sup> and justify it with the following observation:

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64. U.C.C. § 2-205 (2001).

65. I have often sat down with U.C.C. sections and speedily found myself so intellectually muddled that I have made a hasty exit into commentary and cases, hoping thereby to discern the law, which I could somehow read back into the statutory language. I did all right, but the methodology (or lack thereof) somehow lacks real rigor and honesty in dealing with a statute.

66. CAROL L. CHOMSKY & CHRISTINA L. KUNZ, *SALE OF GOODS: READING AND APPLYING THE CODE* (West 2002).

67. *Id.* at 4. The seven steps are as follows:

Step 1. Make a “jot” list of the general subject matter of the statutory provisions.

Learning to read and understand a statute, particularly a code with interwoven provisions, is both a skill and an art, and it is different in many ways from reading and understanding cases. Case holdings can be articulated in narrow or broad terms, and can be tied more or less closely to the facts of the case. . . . Statutes, on the other hand, are written as general rules, and the rules change only if the legislature amends them. The precise language in the statute is decisive. Though paraphrasing and re-articulating a statutory rule may sometimes assist your analysis and explanation, you must return to the precise words of the statute in order to find your authority. Every word in a statute is operative and therefore meaningful; there is no *dicta*.<sup>68</sup>

I subscribe to the spirit of that observation, and, in a rudimentary way, have been trying to employ their method for myself as I re-engage parts of the U.C.C. I have long haphazardly done much of what they recommend by parsing sections, making flow charts and margin cross-references, and even (on rare occasions) drawing grammar school-like sentence diagrams. Time-devouring as their suggested method is, I really think Professors Chomsky and Kunz are on to something very positive.<sup>69</sup> I am also intrigued by a technique explained by Professor Stephen Sepinuck in a recent article in *The Law Teacher*.<sup>70</sup> He calls his method, or one facet of it, simply “reverse problems” which he describes as follows: “In reverse problems, students are not provided with a factual pattern and asked to determine how the statute applies. Instead they simply have the statutory text and are asked to provide an example of the facts to which it might apply.”<sup>71</sup> Most teachers have probably tried something like that on occasion, but I doubt it

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Step 2. Read the statutory provisions closely, identify defined words, and annotate the statute.

Step 3. Rewrite the statutory rules.

Step 4. Read and annotate the Official Comments and supplement your annotations of the statute.

Step 5. Check cross-references.

Step 6. Diagram at the macro level.

Step 7. Create a diagram of the “Really Big Picture.”

*Id.* Thereafter, the editors illustrate their method using scope sections. *Id.* Any curious reader must consult the beginning of this casebook for a fuller understanding of their methodology for statutory analysis.

68. *Id.* at 3.

69. I am still inclined to use case law heavily for some sections that codify standards as opposed to rules, such as U.C.C. section 2-314. No matter how imaginative an effort one makes to understand the dimensions of merchantability, cases will be needed to show what courts have truly done with this term in multiple fact settings.

70. Stephen L. Sepinuck, *Teaching Statutory Construction Through Reverse Problems and “Why” Problems*, *THE LAW TEACHER* (Fall 2005), at 4-5.

71. *Id.* at 5.



is systematically used for Code teaching. While I initially would use “reverse problems” sparingly in class, I intend to appropriate it as one method of increasing my ability to educate myself on fresh statutory material. One thing I can say to a new professor taking on a U.C.C. course is to seriously consider these teachers who are breaking ground in learning and teaching a hard subject from the inside out rather than from the outside in. In my view, case law and commentary on the U.C.C. will have an abiding role in Code teaching, but dissecting the statutory language first can make us better scholars and teachers of the Code. A tangential benefit may be to induce our students to be more comfortable as Code scholars, not only as common law scholars, in an era where transnational commercial and contract law (and foreign law) will almost certainly become more important for practitioners.

### 7. *Problems for Class*

Good teaching in contracts and commercial law courses, especially the latter, requires more than meaningful exposure to and understanding of cases and code sections. Teaching rules and concepts from all possible sources with the utmost clarity *without application* is teaching law for dilettanti, not law for lawyers or prospective lawyers. Amidst whatever else we try, we must teach by application, and application in the classroom involves at least some problem solving. If you use a book that has many problems, be certain that you have mastered—*really mastered*—every problem that you intend to cover in class. Most problems involving three or more parties require some sort of graphic illustration. A chalkboard can suffice, but with high technology, there may be something more to your taste. If you intend to diagram a problem, try it ahead of time. Few things can run a class off the rails as quickly as a professor’s failure to correctly perceive the relationships of parties in a fact pattern or the professor’s failure to guide students to an acceptable solution of a problem. I recall a well-verified report of a first-year professor being reduced to humiliation and near tears when she got tangled up in a hypothetical fact pattern and simply could not come to a sensible resolution. I came near to the same fate, but knew enough to salvage the session by putting off an issue until the next session. I do *not* imply that a teacher can never admit wrongs. Confessing to a mistake in doctrine or in misunderstanding the facts of a case or a problem should be immediate. But, the fewer mistakes, the better for all. Beware: if you use a casebook with problems or handouts with somebody else’s problems, work them through, have citations to authorities handy, and be ready to proceed mostly from memory, else the class may lose interest.

Drafting problems after you are familiar with the doctrine is a pleasurable aspect of teaching. It offers a chance to experiment boldly with styles of questions running from long fact patterns calling for multiple levels of analysis to multiple-choice questions testing whether students understood a case. If you draft your own, be ready with a step-by-step analysis and be ready for challenges to the integrity of the problem. If students find issues you did not intend to plant, recognize them and go with the flow.

#### B. DEVELOPING A SENSE OF THE STUDENTS AND THEIR QUESTIONS

[A] decent teacher knows the names and faces of all her students, and constantly lets the students know that by calling them by name inside and outside class. If you don't believe me about this, ask yourself: who is the one teacher in your entire life who made the biggest difference for you—who taught you so well that you still think about him or her as your best teacher. I bet that for almost all of us, that best teacher was someone who knew you by name. A classroom in which students feel they are anonymous is a classroom where students feel they can fade in and out without anyone's knowing or caring.<sup>72</sup>

Professor Syverud's advice about memorizing names is sound, but he sets out a major chore for many of us. My current contracts section has 121 students, and I assuredly have no photographic memory. Therefore, I take my own photograph of every student, or coax my college daughter to do it for me, and then make my own photo album for each course. By going over it row by row, I gain a *reasonable* mastery of names over time. Many of my colleagues do better than I, but students appreciate any sincere and persistent efforts, and for a time are forgiving about mistakes. In this simple act of working over the names with faces and associating each student with particular questions or comments, one's sense of knowing the class becomes stronger. Knowing names without any relationship on a one-to-one basis may initially seem superficial, but somehow there is integrity in the mere act of trying hard to learn who is on the roster. Trying hard and using the names often in class builds community in a surprisingly short time, and tends to humanize the classroom experience.

Given my own tendency toward bear-hugging people (figuratively), I need to exercise caution lest I seem to be creating friendship. But students seem to understand this very well: this professor is not exactly my friend

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72. Syverud, *supra* note 5, at 249.

(after all, he will grade me), but he or she is somebody whom I can *trust* as I struggle. A sense of trust will generate a peaceable and interactive little community; hence, part of preparation is refreshing your recollection of names. If you intend to call on anybody, make the choice (with possible substitutes) before class taking into account where people sit, whether the case for any reason seems like a bad fit for the person, being sensitive to race, gender, sexual orientation, and other factors. If you are unsure of the pronunciation of that student's name, slip in a little early and find out. The effort will be rewarded, as the student is visibly more at ease in entering into conversation with a person who cares enough to enunciate his or her name correctly.

There is another facet of understanding the students, namely, discerning what is bothering them, especially about the subject matter. Sometimes I would rather not know, but that seems a little cowardly, so I risk finding out. If they feel *safe*, they will disclose their uncertainties, confusions, and frustrations. If you *listen* carefully before and after class, you can usually detect areas where students are muddled. It is easy to be frustrated if the muddle seems inexcusable, but better to address the underlying issues than to manifest frustration at what is being articulated, because manifesting frustration will choke off future revelations. Discerning the real difficulties enables you to chart a course for clarifying comments or fresh problems for the sessions following. A very effective way to open a class is to dedicate a few minutes to clearing up confusions discerned after the previous class, to be supplemented with a short problem or two that challenge the students to overcome the difficulties detected. You need not mention exactly how you detected the difficulties you are addressing.

When you walk into a class with a real knowledge of the students, you can deliver what you have to offer with a high expectation of gaining a good reception.<sup>73</sup> If your problems, questions, and comments are truly aligned without your students' current intellectual needs, real teaching and learning can happen; the fog will recede; and for a while, law school makes a little sense.

### C. DEVELOPING A PLAN FOR USING THE CLASSROOM TIME

After a teacher has prepared his subject, he has to communicate his knowledge of it . . . , if he fails in this he has failed as a teacher

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73. In any educational endeavors, developing a good sense of the students is important. I am reminded of a curious old book on teaching young children first published in 1950; the book places considerable stress on the value of knowing the children without being too personal. See GILBERT HIGHET, *THE ART OF TEACHING* 33-48 (Vantage Books 1989) (1950).

. . . . Communication, the transmission of thought from one mind to others, is one of the basic activities of the human race; it is a skill through which men make magnificent successes and startling failures, an art without which genius is dumb, power brutal and aimless, mankind a planetload [sic] of squabbling tribes. Communication is an essential function of civilization. Teaching is only one of the many occupations that depend upon it, and depend upon it absolutely.<sup>74</sup>

Understanding the subject matter and knowing the students is two-thirds of good preparation. Deciding upon a plan for establishing meaningful communication during the class session is the last one-third. The first fixed thing to consider is the length of the class session, which will have been fixed by somebody else. With the time fixed, figure out *meaningful divisions* of the time for things you want to accomplish, and the methods to use within those time divisions. A casebook can drive the order of presentation, but a professor must use the casebook, not be controlled by it. It is a pedagogical tool, not the silent director of everyone's classroom time.

Most sessions should start with a welcome, housekeeping announcements, and either something declarative, e.g., the topics or cases to be covered during the session or a question that opens up some facet of the subject matter for the day. If you elect to stress case analysis in a traditional manner, then you must estimate time for questioning students, time for their questions, and time for your comments, if any, that will follow. If you intend to stress problems, it is important to figure out a means of insuring that the applicable doctrines have been mastered or at least have been made accessible within the scope of the assigned reading. Otherwise, some supplementation before starting the problems makes sense.

If you intend to use tools of any sort (from a chalkboard to a smart board), factor in the necessary times for transitions and make sure everything is available. When the external things are taken care of, think through questions and comments that can actually make the class come alive. The visual aids, notes, and the like that professors carry into class vary greatly from person to person. But in all events, decide what you can communicate adequately without any visual aids and use such aids only when you deem it necessary. Spontaneously created visual aids are not always successful. If you are going to draw anything of any complexity on the board or otherwise, draw it first on a pad and think it over from a

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74. *Id.* at 86-87.

student's vantage point. The longer I teach, the easier this part of preparation becomes, but it always requires a considerable expenditure of energy.

My own method is to top off preparation with a written single-page *agenda* that shows point by point where I intend to lead the class during the session. If cases appear on the agenda, a few summary questions follow each citation to a case. If Restatement sections will relate to the cases, I list the sections, as I do with U.C.C. sections in connection with cases or problems. I notice that younger colleagues now use the high technology approach and put the agenda or roadmap on a screen in full view. Maybe that is an improvement over my method, but I prefer making hard copies of my agenda for distribution before class so that every student has a dated copy for every session. I encourage students to bind these agendas at the end of the semester, along with handouts and their own notes. That way every student necessarily has a paper trail showing precisely where we have traveled during the semester.<sup>75</sup> Some will protest that this technique reduces the challenges that students should face. My rejoinder is that this technique justifies higher expectations. I nearly always affix a few short problems to the reverse side of the agenda, and try to leave room for a copy of one cartoon applicable to law and lawyers. With proper attribution, I understand this is fair use. A cartoon lightens the spirits and injects a little fun. When I have reviewed my own copy of the day's agenda and feel comfortable with every topic and know that I can talk with ease about every point on it, I can walk to class without fear or anxiety. I may not know all that I ought to know, nor have the skills I ought to have, but within the time allotted, I have given it my best shot which is really all any sane person should want to accomplish.

#### IV. MAKING SENSE OF TIME IN THE CLASSROOM

Memories of law school (often negative) turn mainly upon classroom experiences. Thinking of the classroom from the professor's perspective, my hunch is that most persons who enter teaching do so in the sincere belief that being in the classroom will be rewarding, and that he or she can make the classroom experience rewarding for the students. It seems plain to me also that when a professor fails on the tenure track, the reason for failure is *usually* grounded in a lack of ability (or a perceived lack of ability) to succeed in the classroom, though some schools rate published scholarship so highly that intense scrutiny of scholarly work may cause candidates to

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75. If you bind your own annotated agendas from every session with exhibits used in class, it becomes a carry-around handbook for the year following. Save them for a few years, and you will have a marvelous record of where you have traveled in that subject.

stumble more often than teaching might. Although much else goes into teaching, the classroom experience is critical for every serious student and professor. For the most practical of reasons, every professor needs to ask: What should I do with my allotted time in the classroom?

The question posed has an ethical dimension. The ethical dimension arises because of the investment the students are making. Quite apart from tuition and related monetary outlays, the time investment is enormous. My current Contracts class has 121 students. We meet for 75 minutes for 28 sessions during the first semester. If you multiply the number of students by 75 minutes and divide by 60, it is apparent that in each session I am taking up 151.25 student hours. Over the course of the first semester, I am confining my students for a collective total of 4235 student hours.<sup>76</sup> My only point in playing with the numbers is to demonstrate that students are giving up something very valuable to be in my classroom; therefore, to be responsible, I must take the classroom time seriously. Taking classroom time seriously does not mean stuffing the maximum amount of coverage into the hours available. Neither does it imply that each session ought to be managed with a grim and puritanical attitude toward each moment as it passes. Rather, taking students' time seriously implies that the professor will make a plan for the use of classroom time, and that he or she will assess at reasonable intervals whether or not classroom time could be made more valuable for the students by changes in style and substance.

There is another ethical dimension to the use of classroom time, namely, coverage. There are inevitably tensions between depth and breadth of coverage and between enhancing knowledge and building skills as recognized by Professor Whaley.<sup>77</sup> Obviously, no student with the wits to pass any respectable bar examination will try to practice in any area from memories of classroom coverage, but meaningful exposure to a wide range of issues, doctrines, and sources of law is vital.<sup>78</sup> The class time is for the

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76. If each student were billing out his or her time as a legal assistant (many of them could), the bill would probably be over \$250,000 for the student hours collectively invested in a three hour course.

77. Professor Whaley remembered, "I once took a course in trust law. The casebook contained well over 800 pages, but the professor only made it to page 130 by semester's end. I remember thumbing through the 700 or so virgin pages with a great sense of unease, and I've never known what to reply when asked, 'Did you study trusts?' You need to plan your scope of coverage carefully, trying to guess ahead of time how much of each semester should be devoted to which topic. Invariably, you will guess wrongly or unwisely, but this experience points up the adjustments to be made the next time you teach the course. And, obviously, it is better to have some idea of where you are going than none at all." Whaley, *supra* note 1, at 127.

78. For example, in contracts, especially if the course is limited to four or five hours, it may be difficult to carve out meaningful time for covering the law of conditions, or assignments and delegations, or the law of third party beneficiaries. But, woe to the professor who bypasses these doctrines without at least advising of their importance! Students will remember the class more for

students, not for the professor's self-indulgence in explorations of topics he or she deems most interesting and seductive at the moment.

Recognizing that use of classroom time is a serious matter does not answer the question of how the time ought to be used. There is no single best answer. I began by trying to emulate the methods of the professors whom I admired as a student and from whom I thought I had gained the most. With memories as a guide, I mainly tried varieties of questioning or what many professors refer to as the "Socratic" method. I have kept this up, but as my confidence in my own understanding of what constitutes the Socratic method has waned, I have added commentary, joint problem solving, and simply conversation to my own classroom repertoire, and increasingly rely upon one-to-one counseling as instructive.<sup>79</sup> Due to the large class sizes, I have not gone in for simulations. Every professor needs to find the combination of methods that feels right, so long as the feeling is rooted in honest assessments of effectiveness and a reasonable rapport with the class. If a professor feels great about his or her teaching, and the class is outraged or a significant number of students say they are learning nothing, that professor probably needs to assess the grounds upon which the positive self-assessment rests.

On a most rudimentary level, within the fixed hours scheduled for classroom instruction, I discern four major concerns: (1) setting the right tone; (2) asking meaningful questions and listening for answers; (3) making sensible statements about law and its application; and (4) stimulating exchanges, including conversations aimed at problem solving. All of the above concerns or factors are commingled in most classroom sessions.

#### A. SETTING THE TONE

Spontaneity in class is vitally important. But—with due respect—law students . . . want to know the limits. They want to have a sense that there are limits within which they are free to be spontaneous, and they want to know from you in advance what those limits will be and how you expect class will work. In short, they want to have the sense that someone is driving this bus and assuring it will get to its destination.<sup>80</sup>

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what was missing than for what was covered. For most students, meaningful exposure to basic doctrines occurs in contracts and commercial law courses or never.

79. Occasionally, I have a student report from an outside source on a topic in which he or she has manifested a particular interest. I occasionally invite a visitor, for example, a practitioner or a representative of the American Arbitration Association.

80. Syverud, *supra* note 5, at 248.

With any law school class, but especially with the large first-year class, the professor needs to take charge. *Authority* may be a bad word in many educational contexts, but it can convey a positive message to persons going into law teaching. A person who teaches well must assert his or her authority with respect to the use of classroom time. When one hundred or more energetic persons are confined in a space for fifty-five to seventy-five minutes on a regular basis, somebody truly needs to be in charge or chaos and unpleasantness will follow. A man or woman hired to teach law is hired, at least in part, on the basis of credentials. A person with appropriate credentials is presumed to have attained something the students have not yet attained, else why the salary? Therefore, do not go into class with a declared objective of *learning the subject with the class* or venturing forth together *to share in the exploration of the subject* you are assigned to teach. I believe that a professor must positively go into class with this set of assumptions: that the professor is the guide and the governor for the time allotted, who is responsible for the meaningful use of the classroom time, and who will be serious about holding students accountable for making progress in understanding the subject matter. When it comes to the ability to set the right tone, I have observed no distinction between male and female teachers; a petite woman often exerts quiet authority that students respect. A loud voice might be an asset, but it alone does not count for very much.<sup>81</sup>

Assuming authority in the classroom is no excuse for disrespect, meanness, condescension, or hostility toward any student or group, even if a student impatiently or angrily flares up. A professor worthy of the appointment will never abuse any student verbally either in class or out—whatever the circumstances—though a firm statement to restrain abusive speech (especially if directed against somebody else in the class) might be necessary.<sup>82</sup> A professor needs to maintain an evenness, as would a good

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81. I am thinking of the delightful remark by Dean Griswold. See ERWIN N. GRISWOLD, OULD FIELDS, NEW CORNE 114 (West 1992). ("In my days as Dean, I used to say, jokingly, of course, but with a point, that 'ninety percent of the qualification of a really good law teacher was a clear strong voice,' adding that 'if he has some brains for the other ten percent that helps.'"). I take it that Dean Griswold simply recognized the necessity of *communicating effectively* in the classroom.

82. In nearly twenty years, nothing intensely hostile has come forth in class directed toward me, but on a few occasions students have become impatient either with the material or my manner of covering it. Invitations to discuss the subject matter or my methodology after class have sufficed to quell any anger. I have observed hostility manifested on one occasion when I visited a new professor's class and a student put forth a question dripping with hostility. The professor, unfortunately, returned a hostile answer and the class degenerated speedily. Manifesting hostility in class is truly self-destructive. It is far preferable to invite the student to your office for a conversation after the class, by which time anger will probably dissipate.



judge. Just as a good judge should never abuse the advocates, so also a good professor should maintain respect at all times for the students collectively and individually, in class and out of class. Condescension is a kind of abuse. Neither naiveté about matters of culture nor significantly different cultural assumptions nor slowness in understanding the subject can justify publicly putting down a student. With the immense diversity of the students flowing into American law schools, there is a wide diversity of accepted cultural norms. Professors risk generating unnecessary resentment when assuming that upper middle class values or any other values are beyond reproach or that lack of an easy familiarity with the professor's values is a deficiency.<sup>83</sup> A professor needs to model behavior that would be appropriate in an attorney or judge. A lack of civility or decency or any smugness in the classroom will go far toward creating a bar and bench in which civility is disregarded.<sup>84</sup> Speaking in a disrespectful manner about a student out of class, e.g., to another faculty member, can constitute abuse. It is of the utmost importance that a professor treats students with respect. To the extent of his or her capacity, a professor should cultivate an honest affection for the students.<sup>85</sup>

While others may differ, I can see no place in a classroom for profanity or vulgarity, including vulgar humor, even if it does raise raucous laughter at a time where levity might be helpful. Profanity or vulgarity *will offend* some students, even if they outwardly manifest nothing. Sparing use of good humor can be an appropriate pedagogical ploy, but be careful not to over-use humor as a pedagogical device lest you become a comic figure

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83. Moreover, given the diversity to which we aspire, at most schools some percentage of the students will stumble from time to time on difficult subject matter, which will be more readily grasped by others. When the net for law students is cast far and wide (with success), the resulting community will assuredly not always consist of like-minded inquirers or students of even abilities.

84. The Model Rules of Professional Conduct promulgated by the A.B.A. do not contain any rule requiring civility. If there were such a rule, it would be aspirational, no doubt, as meting out penalties for incivility; for example, during the course of depositions, it would be difficult to accomplish in any fair-minded way. In my opinion, civility in the practice of law should arise from a bar member consensus that deems civility to be a virtue and perpetual incivility to be a vice. Civility will probably not be honored as a virtue by bar members if it is not inculcated in law schools.

85. Syverud, *supra* note 5, at 247-48.

Very few of us are good enough actors to hide what we feel about our students during forty-five hours of give-and-take over a four-month period. If you don't like them, they will figure it out. And many of them will stop listening to you once they figure out that you don't like or respect them. Oh, they'll learn what is necessary to survive the exam, but they will lose all sincere interest beyond the exam in the *ideas* you are trying to convey to them. They will surely stop caring about becoming the sort of lawyer or scholar or thoughtful human being that you and your institution should be trying to produce. And thus you will fail as a teacher.

*Id.*

rather than a teacher. As Professor Whaley advised, “Surely your goal was not to entertain the students, to dazzle them with your talents and abilities or even to display for them your awesome intellect and knowledge. The goal is *to teach the students law*.”<sup>86</sup> Jokes in any manner playing upon race or gender are out of bounds, with rarest exception. Humor in any manner playing upon religious affiliations, differences, or even eccentricities, is best left out of the law school classroom.<sup>87</sup> Religious convictions run deep and religious affiliations are varied. Offense can be easily taken if a light-hearted remark is felt to bear upon something deemed sacred by one person or group.<sup>88</sup> I presume that in law schools that are part of religiously oriented universities, religion in some fashion may bear upon the day-to-day life of the institution. Yet otherwise, the law school classroom is best treated as secular space where religion is neither advanced nor dealt with in any tone that might be construed as disrespectful. Alienating a man or woman at the deep level of existential concerns will assuredly impair communications on more mundane matters.<sup>89</sup>

Creating fear in the students is an unworthy objective. I do not believe that grinding students down or demonstrating their ineptitude has any pedagogical value, except perhaps for those who make some character gains in the course of surviving the ordeal. Law school is not para-military training.<sup>90</sup> The tone established in the classroom should be a tone that generates free but *disciplined discourse*. Wholly undisciplined discourse undermines any serious academic purpose. A cocktail party atmosphere is no good. Neither do televised political debates have much to offer on the topic of disciplined discourse. On the other hand, a mechanistic or highly stylized form of discourse will not be conducive to intellectual growth. Students should be articulating honest questions and making honest statements. They should not be acting as if they are merely playing roles in an academic performance. The atmosphere should be warm and friendly, but it should not give rise to any notion that buffoonery is honored. The

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86. Whaley, *supra* note 1, at 131.

87. It goes without saying that sometimes the subject matter involves consideration of religion and religious views. For example, I am teaching a seminar entitled “Education and the Law.” Three one hundred-minute sessions are fully devoted to the Free Exercise and Establishment clauses of the First Amendment to the United States Constitution.

88. You will never find out about feelings unless a student trusts you enough to talk in private about things held most sacred and things that offend.

89. I have never hidden my own religious background or convictions, but I never advertise either. Having a responsibility toward all students, including those who have a deep hatred of traditional religious institutions, I hesitate to take a stand that impedes communications. But, if pressed, I think that honesty, even in matters of existential concern, is the only fair way to work.

90. I imply no disrespect for either the military or methods of instruction. I merely take issue with the “boot camp” model as being a useful model for any aspect of law school.

professor should maintain a respectful distance, being friendly without creating friendships.<sup>91</sup> While being on a first name basis works for some of my colleagues, I prefer surnames. One need not be pompous to accept the title of *professor* in day-to-day discourse, inasmuch as most students feel right using the title.

Above all, a professor should be *fair*. Picking out favorites or paying special attention to a self-created clique, no matter how talented, is a recipe for disaster. If you are dealing with a class as a whole, try to deal through their elected representatives, respecting those chosen to represent the class. By being professional in interactions with the class, treating students as junior lawyers, and challenging them to fill honorable roles in an honorable profession, the teacher creates good and healthy mutual respect with the class.

An unprepared student is a special challenge. If someone has been sick or away for a funeral, under-preparation is excusable, but if a student has no excuse for an evident lack of preparation—especially if it occurs more than once—the situation is delicate. Words of cheap comfort or tacit approval can create cynicism. Injecting humor wrongfully tends to reward or even exalt that student inasmuch as light-hearted words may convey approbation, leaving the impression that the slacker is being rewarded for circumventing class requirements. An honest and caring teacher does not overtly or tacitly approve of any student strutting non-preparation or under-preparation. To approve gives way to corrosive cynicism that can eat into the joy others are experiencing as the reward for hard work on difficult subject matter. An immature student may begin to doubt the value of any disciplined study of law. The responsible response to a perceived lack of preparation, therefore, must be serious without being mean.<sup>92</sup> Finally, in the wake of all well-meaning advice, including anything narrated herein, a professor needs to be true to himself or herself. I defer to Professor Whaley:

The best advice I have for you—advice I warrant sound—is this: *Forget yourself*; think of them. Do this at all moments in the classroom and you will be amazed how well your classes go. . . .

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91. I have many friends among alumni and alumnae. I see no problem with that and little danger when friendships develop during the last year of school when students will no longer be in your classes. But beware lest conversations about school or other professors arise; there is danger if a professor becomes ensnared in any conversation about any colleague.

92. I have never satisfied myself on the best in-class verbal response, partly because students are less and less frequently under-prepared as years pass by. My vice has been to be too easy on the under-prepared student. I counsel as follows: a serious gaze, a brisk turn to another, and so on until a good dialogue is possible. It is easy to forget within the safety of our academic environment that we are training people for very serious responsibilities, which many will assume in a very short time.

If you concentrate on the students when teaching, your own personality has a chance to come through. Let it. Each faculty member fascinates the students, and students will catalog your virtues and your faults and bruit stories about you through the halls. If you disguise your personality, the students will find you out and think less of you as a phony.<sup>93</sup>

#### B. ASKING QUESTIONS AND LISTENING FOR RESPONSES

Since my law school days and long before, running back to the days of Dean Langdell at Harvard Law School, a method of teaching usually described as “Socratic” has been preeminent.<sup>94</sup> I have often wondered whether Socrates would be flattered or mightily offended were he to observe from a restful vantage point in an after-life the manner in which his name is associated with teaching law in American law schools. On reflection, I do not feel competent either to define or to illustrate the Socratic method, though I believe that I have recognized some variations of it, especially in the questions so well posed by my elderly and distinguished teacher of ancient Greek during undergraduate days.<sup>95</sup> Sitting on appointments committees for recruiting law professors, in response to inquiries about possible teaching methods, a common answer I have heard is “soft Socratic.” I am not certain what that term means. It might be a polite way of subscribing to traditional expectations with an intention to excise any suggestion of harassment. It might mean that a prospective professor has thought out a method of teaching by posing questions minus any attempts at humiliation. I doubt that there is among American law professors a common understanding of the Socratic method of teaching, except that the term points away from lecturing and toward putting questions to students as a means of instruction.<sup>96</sup> Used in that loose sense, I subscribe to the method so long as it is used with sense and sensitivity. To avoid any possible insult

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93. Whaley, *supra* note 1, at 131-32 (emphasis in original).

94. See, e.g., Peggy Cooper Davis & Elizabeth E. Steinglass, *A Dialogue about Socratic Teaching*, 23 N.Y.U. REV. L. & SOC. CHANGE 249, 261-64 (1997).

95. Dr. Alfred Haefner, Wartburg College, Waverly, Iowa.

96. Definitions are uneven. For example, *Black's Law Dictionary* defines the term “Socratic method” as follows: “A technique of philosophical discussion—and of law school instruction—by which the questioner (a law professor) questions one or more followers (the law students) building on each answer with another question, esp. an analogy incorporating the answer.” BLACK'S LAW DICTIONARY 1425 (8th ed. 2004). After a brief reference to the life of Socrates, the entry continues, “His method is a traditional one in law schools, primarily because it forces students to think through issues rationally and deductively—a skill required in the practice of law.” *Id.* The description of “Contemporary Socratic Discourse” in the article by Cooper Davis and Steinglass (which includes critiques) shows a greatly more expansive notion of what fits within a current understanding of the Socratic method. Cooper Davis & Steinglass, *supra* note 94, at 265-275.

either to Socrates or his purer followers, I will write in simple terms about asking questions, listening for answers, and building on answers with an objective in mind. I disclaim any intention of explaining or illustrating the Socratic method in any deep philosophical sense, though there is decent literature on the subject readily available.<sup>97</sup>

If you are new to law teaching, be clear on this: something passing as a form of Socratic questioning will be expected in first-year courses. You might be surprised at the extent to which lecturing as a means of instruction is disfavored in American law schools.<sup>98</sup> Students *expect to be questioned*, and many would no doubt feel short-changed were they to go through their first year courses without ever being called upon. Being called upon to discuss a case—at least in my experience—has become a right of passage. *If that is a given where you teach*, there are things to avoid and things that can usually be worked out (tactics that can be described) without boring deep into debates about pedagogical theory.

It is advisable to avoid questions calculated to hurt or embarrass students, although the practice of cold calling does tend to expose the unprepared student and may thereby (justly) leave some stain of embarrassment. Questions put to a student may rightly require a recitation of facts gleaned from a case or elsewhere, but a teacher ought to be careful not to infantilize, e.g., by asking for a recitation that in its simplicity would humiliate a conscientious sixth grader. A professor is responsible for the whole of the class while engaging one student; therefore, asking questions that call for a narrative statement of facts is problematic if the student called upon is soft spoken and others cannot hear the student's response. A common vice with which I have been occasionally afflicted is talking too fast and posing questions sequentially without sufficient pauses for giving the students time to think. Machine-gun rapidity in questioning is no virtue. Compound questions, vague questions, or questions of undue length and complexity that confuse students are of little value. Questions that lead down a wrong path can have a high value, if there is ultimately a way to finding some acceptable escape from the dilemma created, but questions

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97. With the kind assistance of reference librarians at New England School of Law, I was able to unearth, in short order, some rich and recent literature on use of the Socratic method in law schools and arguments about its value. See Peter M. Cicchino, *Love and the Socratic Method*, 53 AM. UNIV. L. REV. 533 (2001); Steven Hartwell & Sherry Hartwell, *Teaching Law: Some Things Socrates Did Not Try*, 40 J. LEGAL ED. 509 (1990); Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113 (1999); Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517 (1991).

98. From my limited experiences at European universities, whether in law or humanities, lecturing lingers as a common means of instruction.

that only strip students of confidence or exacerbate the built-in power imbalance serve no good purpose.

If a line of questioning presupposes familiarity with certain facts, those facts ought to have been reasonably available in the assigned reading or should be elicited before the questioning begins. While questions that call for deductive reasoning can be enlightening (perhaps going to the heart of the material under discussion), deductive reasoning cannot enable any student to build up our legal system or any significant part of it in the contracts and commercial law area. This is probably self-evident, but let me illustrate the point with reference to the venerable doctrine of consideration.<sup>99</sup> One could put forth the premise that a promise made in exchange for a promise or other consideration is enforceable and the countervailing premise that a promise made without any promise or act or forbearance given in exchange is not enforceable for want of consideration. But, take any ordinary Article 2 contract and stipulate: a buyer makes a promise to pay a higher price than initially agreed upon for specified goods without receiving anything in exchange; hence, the promise is made without any consideration in return. If the requirement of consideration is the major premise (consideration in exchange for a promise makes a promise enforceable), and the promised price increase for the goods is spelled out as a minor premise (no consideration was given in exchange for the promise to pay a higher price), the conclusion will necessarily be that the promised increase must be *unenforceable* for want of consideration. The conclusion is true (generally) at common law, but self-evidently false under U.C.C. section 2-209(1) which makes the promised modification of price enforceable without fresh consideration if there is good faith, no duress, and the like.<sup>100</sup> One can speedily do the same exercise with common law options and U.C.C. section 2-205 and many other doctrines.<sup>101</sup> It becomes

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99. See RESTATEMENT (SECOND) CONTRACTS § 71 (1981) (defining bargained for consideration).

100. U.C.C. § 2-209(1) states: "An agreement modifying a contract within this Article needs no consideration to be binding." U.C.C. § 2-209(1) (2001). Professor Farnsworth provided the following explanation:

Uniform Commercial Code 2-209(1) completely abrogates the [pre-existing duty] rule as to contracts for the sale of goods. 'An agreement modifying a contract within this Article needs no consideration to be binding.' Although no writing is needed under this provision of the Code, the Statute of Frauds section of the Code must be satisfied if the contract as modified is within its provisions. Furthermore, although the Code abandons the requirement of consideration for modifications, a modification, in order to be effective, must still meet the test of good faith imposed by the Code.

FARNSWORTH, *supra* note 12, at 272.

101. For example, consider the abolition of the consideration requirement in U.C.C. § 2-205 which states as follows:

apparent very quickly in contracts and commercial law that deductive reasoning does not take us very far toward finding *any working rules of law*. Consequently, while deductive reasoning has its role, *finding the law* by deductive reasoning in these areas is wrong-headed, unless of course, you want to use such reasoning to demonstrate its inadequacy under our current legal regime.<sup>102</sup>

If we cannot find the working rules of contract and commercial law by deductive reasoning, there are practical limitations on the value of questioning students in class and dangers in doing so. Yet, I continue to use one-half or more of my classroom time to pose questions, as do many of my colleagues. Therefore, it makes sense to ask: if questioning students constitutes a major part of a class session, and finding the law by deductive reasoning is not usually a viable objective, what kinds of questions make sense for pedagogical purposes, apart from questions calculated to pressure students to read the assignments with care? I do not know of any school that systematically tries to help a fresh professor answer that question, but you must come up with an answer of some sort that satisfies. The question can be answered in many ways depending upon the subject matter, the degree to which the class has become engaged in the subject matter, the personal capabilities of the student being questioned, the skillfulness of the professor, and the course objectives set by the professor. Nonetheless, in the midst of all the variables, I believe there are several lines of questioning that can generally be used profitably and in good conscience, especially in first year courses and more sparingly in advanced courses. What I set forth below pertains to use of a case law; I contend some of my thinking will translate easily into problem solving based upon complex fact patterns.

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An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated, or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

U.C.C. § 2-205 (2001).

Professor Farnsworth explained this section as follows:

U.C.C. § 2-205 goes further [eliminating any need for a recital of consideration] in providing for *firm offers*, as the Code chooses to call irrevocable offers. The offer need only be 'in a signed writing which by its terms gives assurance that it will be held open.' It is then irrevocable 'during the time stated or if no time is stated for a reasonable time.' . . . The Code provisions are, of course, limited to the sale of goods.

FARNSWORTH, *supra* note 12, at 178.

102. I also suspect that much of our simplest problem solving in class has a veiled syllogistic form: a rule of law, as the major premise, and variable fact patterns, as the minor premises, lead by deduction to solutions, so long as the facts of the variables do not outrun the rule.

1. *Reconstructing a Relationship as it Must Have Appeared  
Before the Litigation was Commenced*

While I caution against turning any questioning exercise into a *recitation session*, thereby testing mainly whether or not a student has instant recall about the particulars of a case, recounting what can be gleaned from the case report to reconstruct the pre-litigation relationship in a meaningful way can be productive. I do not disparage an *imaginative* approach to such reconstruction. In countless contracts cases, a person or persons were motivated to seek out a lawyer because of disappointment or anger. I deem it often useful to ask a student simply to identify and describe the plaintiff in his or her (or its corporate) pre-litigation situation. This can enable the class to see the situation as it must have appeared when the case was brought to the plaintiff's lawyer. Figuring out what facts that the lawyer probably knew to be true, and what was probably missing or in doubt pulls the class into thinking about the reasons for suing on a particular theory and the relief sought.

Likewise, when the cause of action that has been plead and the remedies sought have been elicited, it can be challenging to imagine the case from the vantage point of the defendant's lawyer when he or she first received the file. Often there were multiple defenses possible, but one defense became the main defense in the reported case. Worthy discussions include why this defense, as opposed to others, generated the main issue in the litigation. A seasoned teacher might object that my suggested lines of questioning call for too much speculation, and that the professor should press the students to strain the reported facts to concentrate only on the *material* facts. The longer I teach the more I am suspicious of dealing with case law by stripping the narratives to what we *ex post facto* want to designate as *material facts*. Within the bounds of reason, I want to recreate a story: it can be meaningful to see simply a human drama as it appeared before hanging legal labels on the parties' maneuvers. Getting behind the case in this way (even if the reconstruction involves some guess work) can enable the class to discern in a very rudimentary way the skills a lawyer must have in a pre-litigation situation.<sup>103</sup>

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103. I have not gone so far as to create mock interviews with students playing characters from the cases, but were time available, it could be more than merely adventuresome so to do. If any reader has tried that, I would be very happy to hear from you.



## 2. *Reconstructing the Procedural History of the Case as Reported*

Setting out issues decided by judges in contracts and commercial law cases, apart from the procedural matrix in which the issues were posed, is usually not a solid pedagogical method.<sup>104</sup> On the other hand, asking a student, “What was the procedural history of the case?” can bring forth fumbling efforts at retrieval and a mechanical recitation that does not enlighten the class very much. As with all facets of questioning, the common temptations are to move too fast and to bundle what can be multiple discrete questions into a very general inquiry. It is tempting to move into an appellate opinion too speedily, by-passing what is stated or can be inferred about the trial.<sup>105</sup> My sense is that if I discipline myself to concentrate a little more on the trial process as it can be reconstructed by inference (usually) from an appellate opinion, and rely *less exclusively* on questioning about the text of the appellate opinion, I can more meaningfully draw students into the case.

When the trial has been covered (the appropriate time investment varies greatly case to case), it is time to move into the appellate process. It is important to elicit (or to state) whether the opinion in the casebook was issued by an intermediate appellate court or the court of last resort in a state, or was issued by a federal court. If the opinion came from a federal court, it is often a challenge to elicit a student’s understanding of diversity jurisdiction (and occasionally removal on a diversity basis from a state to a federal court).<sup>106</sup> Finally, I prefer to wind up the questioning bearing upon procedure with an attempt to elicit a statement of the question or questions presented for decision to the court that generated the decision under consideration. While this is the heart of the matter in a common law system, phrasing issues can well be a very daunting task for a student. I have discovered with hundreds of students that instead of phrasing a question early on, they will try to describe in general statements what a court was

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104. I confess to doing it often due to shortness of time.

105. On procedural matters, if the case was tried to a jury, it is important to ask whether or not there was a dispute about jury instructions, and, if so, which instructions were in dispute. If the text of an instruction in whole or in part is included in a case report, it is usually helpful to take up the exact language of the instruction given. Arguments for and against the instruction as given can be elicited. A teacher can often profitably inquire whether or not there were quarrels about the admission of evidence at trial. If so, arguments for and against admission can be developed. Finally, motions made and denied or granted must be explored. Naturally, many arguments about admitting evidence or jury instructions will have given rise to motions, such as, motions for a directed verdict, judgment n.o.v., or for a new trial. I think it is a mistake in so-called substantive classes to bypass or treat lightly the procedures by which issues go to the appellate courts.

106. Less commonly, it is beneficial to explore the process of certifying a case to a state appellate court for an answer to an unresolved issue of state law.

deciding. Rather than shoot anyone down for poor phrasing or misunderstandings at this stage, I prefer to play around with formulations, challenging students to recast their thoughts into questions to capture what the judges thought they were deciding or apparently did decide. In setting forth questions presented, anyone necessarily needs to incorporate assumed facts. Of course, facts alleged at the trial court must be assumed as true if the correctness of granting a motion to dismiss was appealed, but in other procedural postures, *facts* incorporated into phrasing a question may have been stipulated to, may have been well justified findings at the trial court level, or there may simply be a question of whether the record will sustain findings made below. I try to treat the truth and falsity of factual statements in reported opinions gingerly, using factual assumptions or statements only as necessary to get to what the court decided.<sup>107</sup> Perhaps this is paranoia, but I want to caution against a view that whatever is written in an opinion is necessarily an accurate reflection of events as they occurred. Truth is elusive.

3. *Questions Bearing upon a Court's Decision(s), Rationale, and the Disposition of the Case*

If you have moved a student to a reasonably acceptable formulation of one or more questions presented to the court, the obvious next step is to elicit a statement of the holding(s). As any reader of opinions knows, opinions are often loaded with express statements about holdings, e.g., “we hold for the first time. . .” followed by a declarative statement. Any seasoned reader will also divine that in many opinions it is apparent that the court *held some things*, that it decided questions presented, without any explicit statement designating the decision(s) as being a *holding*. It is important to press for an articulation of what the court decided with respect to the questions presented, as opposed to the whole of what the court stated. Naturally, a discussion of *dictum* or *dicta* will commonly ensue. A teacher needs to press for some articulation of the reasons offered by the court for the holding(s) made. The court may simply have anchored the decision in citations to cases and statutes with general language. The court may have carefully distinguished a prior case or may have parsed a statute

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107. I say *gingerly* because I do not want to get tangled-up in class in the normal course about deeper questions as to the truth-finding capacities of judges or juries or the probable truth-finding tendencies, or lack thereof, implicit in rules of procedure and evidence, or the limitations on truth finding inherent in counsel's investigations and discovery. On the other hand, I prefer to avoid creating the impression that whatever is narrated in an opinion necessarily correlates with scientific or historical fact in any objective sense.

carefully.<sup>108</sup> The court may discuss policies that would be thwarted or advanced by one decision or another.<sup>109</sup> Rare is the case where a court says nothing to justify its decision. My view is that in class we should try to probe into a judge's probable thinking about the questions under consideration; that is, why would a judge decide as the judge did, or vote for a decision as rendered? Finally, it may be appropriate, depending upon subject matter, to ask a student whether the case is in conflict with or in harmony with prior cases that have been considered, followed by inquiries as to possible means of distinguishing cases or reconciling them. It is in connection with issues and holdings that I hope to refine the facts, or the assumed or alleged facts, considered to be material by the court. It seems to me that dealing with *material* facts or facts deemed material apart from issues and holdings is unproductive or worse.

All of this assuredly may seem picky and mundane. I suspect that the foregoing corresponds—more or less—to what hundreds of law professors have done or have sought to do in relation to cases, though many might describe their methods in less detail or in more lofty terms. I mean to offer nothing novel, but I do urge that anyone taking students seriously should try to plan with reasonable care what he or she wants to elicit and the pathway by which this elicitation can reasonably come about before embarking upon a line of questioning with respect to a case. Classroom time is precious. While I discourage anyone from slavishly following a written list of questions, there needs to be a logical sequence of questions that leads toward an end-point, and that end-point should be something that the professor can state with clarity on reflection.

Throughout any line of questions, however, a most important skill (hard to hone) is the skill of *truly listening* for every nuance of what a student says. If what the student says is vague or incomplete, press gently for clarification or completion before moving forward. If a student is really wide of the mark in answering a question, reverse and find a point earlier in the discourse where you and the student were on common ground, or as necessary, kindly ask whether anybody else can help to get the discourse

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108. For true mastery in parsing U.C.C. sections, nobody equals or exceeds Judge Posner. *See, e.g.,* *Empire Gas Corp. v. Am. Bakeries Co.*, 840 F.2d 1333 (7th Cir. 1988) (parsing U.C.C. § 2-306); *Jason's Foods, Inc. v. Peter Eckrich & Sons, Inc.*, 774 F.2d 214 (7th Cir. 1985) (parsing U.C.C. § 2-509). It is really difficult to find enough class time to dive deep into Judge Posner's methods of dissecting a statute, but some attempt in class can be enlightening. Any attempt can highlight the power that word choice, sentence structure, and punctuation can have in the hands of an able judge.

109. *See* *Mattoon v. City of Pittsfield*, 775 N.E.2d 770, 783-84 (Mass. App. Ct. 2002) (decided partly on policy grounds since the judges thought that it would be prohibitively expensive for municipalities to bear warranty liability under Article 2 for water gathered in reservoirs, which could be easily communicated by wild animals indigenous to the region).

fully on track. I try never to abandon any student mid-way in any discourse about a case unless confusion is so apparent as to indicate further discussion will be fruitless, in which case a promise to *revisit* a student as soon as practical lets the student down gently.

4. *Questions on Hypothetical Fact Patterns Before or After Discussing Cases*

I have come to believe that questions on hypothetical fact patterns put to the class as a whole before or after questioning about cases is generally as pedagogically valuable as questions on the cases. Depending upon the degree to which students have mastered the art of reading cases, a teacher might rightfully reduce time spent on cases in favor of spending time on fresh fact patterns. Three or four short hypothetical variations on a case designed to flush out whether students have understood the case can be an enlightening opener. Those who have understood it are eager to volunteer. Those who have not are drawn in. After questioning a student in detail on a case, more challenging variations on the facts can serve a “firming up” purpose. Those who stay on after class are often trying to resolve misunderstandings left by questions of this nature.

5. *Questions Ranging Far Beyond the Case Law*

There are many other good grounds for posing questions. Merely testing out whether or not the students understand terms, raising questions to forge linkages between cases, questions to relate a doctrine to recent newsworthy events, or questions designed to re-awaken an understanding of doctrines or cases or old test questions all may have value. Cross-disciplinary questions can help to weave the meaning of courses together. Although there are doubtless fine exceptions, as a general rule, the better the teacher, the less time he or she spends on lecturing students in order to free time for exchanges with students. Artful questioning generates exchanges, and exchanges enliven; lectures can enliven, but the all-too-common tendency is for a lecture to become merely a transmission of information. A lecture may be impressive, but it does not usually generate intellectual growth as can a good line of questioning. A line of questioning can generate questions that a student wants to ask; if so, allow it. Frequently, another student follows up, and *sua sponte*, a discussion breaks out about the meaning or application of a doctrine or an embryonic critique of a doctrine begins to develop. If this occurs, feel gratified because a worthy goal is being achieved; namely, the art of civil, reasoned discourse on a subject of mutual concern, often a subject of considerable complexity.

### C. LECTURING OR COMMENTING ON THE LAW

People who profess law usually talk a lot, especially in class. In a real sense, we are paid to talk; however, nobody gets paid by the word in the law teaching profession. Beware of monologues: I have experienced not only passivity when I attempted to lecture; on rare occasion I have felt outright hostility from students who felt they did not need whatever I was trying to convey. Nonetheless, within limits, I tend to view lecturing in a positive light, so long as it serves a particular purpose and is not the dominant method of teaching. Due to my own informal approach, I do not dignify my episodic presentations by calling them *lectures* but prefer rather to call these efforts *comments on the law*. Comments on the law rightly placed can be helpful to many. Comments on the law are appropriate for several purposes, five of which are: (1) to preview an area of the law; (2) to summarize an area already covered; (3) to clarify an area that is particularly troublesome; (4) to answer questions posed by students in class or outside of class when those questions tend to cluster; and (5) to parse statutes in advance of problem solving.

#### 1. *Previewing an Area of the Law*

Suppose in a contracts class, you are moving into a chapter involving grounds for avoiding enforcement of promises, having spent weeks on grounds for promissory liability. The students need to make a mental shift away from the subject matter of the immediate past into a new line of inquiry. Instead of searching out grounds for enforcement, they need to search out the opposite. Conceptually, it is like asking a class to reverse directions: no more marching west, everyone must go due east. I see much benefit and no harm in telling students bluntly what the unifying theme in the cases ahead is, namely, how to escape promissory liability. In sales, when the class gets to the sections on remedies, I have always found it helpful to present an overview, either by reference to section numbers or concepts, always with a time line to demonstrate where in the normal course of a contractual relationship certain remedies are applicable. Pointing the way into the future increases student confidence. A critic might well object that previewing the law soon to be encountered diminishes student responsibility too much. My counter argument is that the preview need not diminish responsibility at all; rather, it can make learning more efficient and orderly and can enable students to take responsibility for learning in greater detail and depth. In any introduction to an area of law, a professor can enhance efficiency in learning by advising

of, within reasonable limits, those doctrines and skills the mastery of which are the objectives for the relevant time period.

If doctrinal confusion is possible, it will almost certainly occur. Heading off confusion can liberate students to spend their time productively on comprehending doctrinal points or learning lawyering skills. We have, I believe, in legal academia, overly valued the inevitable times of floundering and tended to turn a blind eye to the vast amount of time that can be wasted when students are muddled. Pointing the way for students, especially when new or difficult subject matter is coming up, is a courtesy rooted in common sense.

## 2. *Summarizing the Law*

I have had mixed results using class time to summarize the law. Yet, if the time is right, and the students are receptive, casting a collective look over ground covered can be as helpful as pointing the way forward. Rather than summarizing the law using whole sessions near the end of a semester, I have found that ten to twenty minute summaries along the way will be much better received. For example, after covering grounds for avoiding enforcement of promises in contracts, I have found it worthwhile to spend a little time summarizing the law from incapacity to impracticability, advising where to lay some stress in reviewing these doctrines. Given the complexity of Article 2's remedial scheme, a summation of available remedies will be very much appreciated, more so if accompanied with common sense illustrations. As with previewing the law, summarizing the law should not reduce student responsibility, but should rather justify higher expectations when students are asked to solve problems. Acknowledging the time crunch in which students are operating, and taking reasonable steps to assist them in channeling their intellectual energies is good pedagogy, hardly coddling. Except in rare cases, twenty minutes is a healthy maximum, thirty minutes an outside limit.

## 3. *Clarifications Along the Way*

A third justification for setting aside class time for commenting on the law is the felt need for clarification when the law seems opaque, or perhaps, incomprehensible. In contracts, one doctrine comes immediately to mind, namely, constructive conditions. Part of the problem is the vocabulary.<sup>110</sup>

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110. As every seasoned contracts teacher knows, constructive conditions are not occurrences intended by the parties as conditions for promissory liability; rather, the courts treat the reciprocal promises as conditions. The blackletter law is captured succinctly in the Restatement. *See* RESTATEMENT (SECOND) CONTRACTS § 237 (2001).

Almost invariably, any reading of the blackletter law and the cases leaves many students in a haze. Perhaps every subject will have its murky spots. I see little value in leaving students struggling to free themselves from misconceptions that could have been easily avoided. Maybe, in a round-about way, students can learn something from unraveling tangled areas of law without help. However, in the normal course, student time will be better spent if a teacher comments with clarity, warning of dangers, thereby liberating students to apply themselves to mastery and application, rather than working their way out of deep confusion.

4. *Answering Questions Common to Many and Raising Questions on Current Use of the Law*

Commendably, students commonly study together, or, at minimum, talk about law among themselves in an informal way. I count these interpersonal aspects of legal education a powerful argument against law degrees by distance learning. When students gather, they often turn up questions about law as taught in class or law's application to current events. The development of common questions creates valuable teaching opportunities, sometimes one-to-one, but also in the classroom. Time is tight and interruptions can be maddening, but if the newspapers turn up an issue relating to the subject matter of a course, and students exhibit curiosity, a little time spent in commentary on the law's relation to that issue can be time well spent. Those of us who love the bookish aspect of the law can all too easily get stuck in the library bypassing law's application on the street. Helping to tie the law as taught to the law in action as seen by the students justifies comment—sometimes extended comment—in class. Sometimes a simple question can enlighten or solidify learning. Recently, as the United States Senate Judiciary Committee hearings on Chief Justice John Roberts were in progress, the term “stare decisis” turned up with regularity in the media. I took just a few minutes in contracts to note that use of the term and to inquire of the students why the Senators were so interested in Judge Robert's views. I think that stare decisis took on more meaning in contract law because they saw its implications for constitutional law.

More importantly, reading assignments, problems, office conferences, and class discussions tend to generate similar questions which flow to the professor by e-mail or otherwise. The questions tend to cluster naturally around topics. I deem it to be a very valuable pedagogical technique to begin class sessions from time to time with a few minutes devoted to addressing clusters of questions that have flowed in since the prior session. Since the questions have arisen, minds are open and teaching opportunities have been created. On those occasions, students have created a vacuum that

can be partly filled by suggestions for further analysis or sources which could be profitably consulted. One need not come (often ought not come) with *answers* to all questions, but rather with pointers toward means by which meaningful gains can be made.

### 5. *Parsing Statutes*

In contracts and commercial law we must focus frequently on the text of the U.C.C. Often, a careful parsing of sections and subsections in class can steer students rightly or generate meaningful questions where ambiguities become apparent. While a formal lecture about a section or subsection is of questionable value, a few comments about the possible readings of the text, especially if courts have split on their readings, can open minds in advance of a problem solving exercise or in advance of a reading assignment. Comments in such a context commingle well with questions by which possible meanings may be elicited. With the availability of document cameras and more sophisticated media equipment, the possibilities of working through statutory language carefully with a large class are greatly enhanced. For me the technology has been intimidating, so I have been slow to adopt it. I am, I hope, on the threshold of a new era in parsing statutes in the classroom setting.

### D. SOLVING PROBLEMS AND DEVELOPING ARGUMENTS IN CLASS

A major goal of any responsible law teacher should be to assist students in developing skills for solving legal problems. Most of the hundreds of students who have suffered through my classes have been priming themselves for legal careers either in private practice or government service. Non-legal careers have not been common career objectives, though a few excellent students have drifted into administration in educational institutions or teaching in law-related areas. No matter where students are headed, assisting them in learning skills applicable to resolving legal problems is a justifiable and arguably necessary use of classroom time. In commercial law courses, I count learning to solve problems in class as the heart of the matter—the chief aim of the course.<sup>111</sup> The questions then arise: How can a professor best use classroom time on problems? Should students always have the problems in advance of the

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111. Most contracts casebooks, as far as I can discern, and all commercial law casebooks readily available, provide some problems appropriate for classroom exercises. I prefer to draft many of my own problems to supplement, and occasionally in substitution for, casebook problems. Draft your own and you know for sure the aim of the problem and can better assess the reasoning required for arguments and possible resolutions.



class? Should the professor set up problems with good competing arguments and press for arguments on both sides, or is it better to have students mainly search for a best solution in light of precedent and policy concerns? These questions drive a professor back to asking about the objectives of a course and the jurisprudential views a professor brings to a class.

I hold some propositions as self-evident in our legal culture: that we work in adversarial court systems, that the language of positive law is often riddled with ambiguities, that by default or design statutes and cases often leave openings for further development, and that where texts are ambiguous or open to development, policy arguments are legitimate and usually advisable for effective advocacy. Moreover, where case law dominates (whether or not built upon a statutory structure), the law tends to grow through arguments based upon analogical reasoning. If these propositions are true, or even partly true, it follows that making arguments for the resolution of problems is a very fundamental skill to practice in law school. It follows, then, that a professor needs to sort through problems in a casebook, or draft problems and questions in advance of class, with some objectives in mind. Early on it is very easy to let the casebook editors drive the class, tugging the students and professor forward together, struggling to figure out what the *correct* answers to casebook questions and problems ought to be. Editors tend to be courteous enough to suggest answers, and, unfortunately, opportunistic publishers sell canned answers (some good—some bad) to paranoid students. The objectives of solving problems can get lost in a rush simply to get the editors' problems finished during the course. That rush may, indeed, bring about some learning, but it will not leave a professor feeling very refreshed.

At the risk of over-simplification, I will posit four major purposes for problems: (1) leading students to understand the application of rules to facts where there is little, if any, doubt about their application; (2) assisting students in the art of developing arguments where sensible arguments from legal texts and policies can be mustered for both sides on fairly straightforward facts; (3) assisting students in issue spotting, constructing arguments, and discerning the need for more facts in complex or incomplete fact patterns; and (4) assisting students in *evaluating* arguments with the objective of sifting out weak arguments that would not benefit clients, if pursued, or would probably be cast aside by a competent judge at trial or on appeal. As opposed to lines of questioning, discussed previously, I much prefer that problem solving across the spectrum from simple to complex be

opened up to volunteers from an entire class.<sup>112</sup> Ideally, of course, problem solving would be done in small groups with student leadership, but I do not discern that to be the norm in contracts or commercial law courses.

1. *Moving Students to Accept the Application of Rules from Cases and Statutes Where There Is Little Room for Argument*

Consider the following line of questions: Does Article 2 of the U.C.C. apply to the purchase of a car by a consumer? Does Article 2 apply to the purchase of cars by a dealer from a manufacturer? Does Article 2 apply to the purchase of groceries? Does Article 2 apply to the purchase of a mug of beer in a bar? Does Article 2 apply to a bilateral contract for the provision of heating oil to a private high school? As every contracts and sales law teacher knows, the answer in each case is affirmative.<sup>113</sup> Questions as to whether instruments are negotiable under Article 3 or whether Article 9 applies can be drawn along the same lines to be simple and subject to an unqualified affirmative or negative answer justified by a citation to a statute and accompanying comments. I am a believer in delivering simple problems to a class in abundance, not because these test anyone's mind very much, but because they help to drive home some baseline rules which students should internalize. A *question* (mini-problem) with a text-based answer does far more to solidify the meaning of baseline doctrines than mere reading or recitation of the doctrine. Since casebook editors tend to draft lengthier problems, drafting your own mini-problems is generally necessary (and fun), but beware: even very simple problems often contain built-in errors, and students are incredibly quick at finding them.

2. *Developing Arguments When Sensible Arguments Are Reasonably Possible on Both Sides*

Consider the following: Is there a case against a power company for breach of warranty if an electrical surge starts a fire that burns down a business?<sup>114</sup> Is there an Article 2 case for breach of warranty against a

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112. I am assuming that in most schools there are no seminar settings alongside of contracts and commercial law courses—or components of those courses—especially devoted to small group problem solving. Were this possible, more dynamic student-driven problem solving could probably be engendered.

113. See U.C.C. §§ 2-102, 2-105(1), 2-314 (2001) (providing in the latter section that sales of food and drink to be consumed on or off the premises are covered by Article 2).

114. It depends on which authorities a court wants to follow in construing U.C.C. sections 2-102, 2-105(1), and 2-314. Compare *New Balance Athletic Shoe, Inc. v. Boston Edison Co.*, 29 U.C.C. Rep. Serv. 2d 397 (Mass. Super. Ct. 1996) with *In re Pacific Gas & Elec. Co.*, 47 U.C.C. Rep. Serv. 2d 598 (2002). See also Jason B. Myers, *The Sale of Electricity in a Deregulated Industry: Should Article 2 of the Uniform Commercial Code Govern?* 54 SMU L. REV. 1051

hospital if silicon implants are placed into a woman's breast as part of a medical procedure, where the implants leak and cause her bodily harm?<sup>115</sup> Does Article 2 provide for a cause of action when someone is injured due to defects in a component part of an in-ground swimming pool?<sup>116</sup> Does Article 2 apply to the sale of drinking water by a municipality when many local citizens get sick from the water?<sup>117</sup> As the citations indicate, these mini-problems can be resolved in different ways. Courts in different jurisdictions using the same statutory scope sections have differed. A lawyer encountering these or similar questions must be prepared to argue not only from the text, but also from precedent, or on the basis of policy if his or her jurisdiction has not gone one way or other. Giving students some practice in weaving together text, precedent, and policy arguments can be worthwhile. Needless to say, problems of much greater length can require much more sophisticated and multi-layered arguments. Granting enough time in class for the construction of cogent arguments rather than spur-of-the-moment thoughts one way or the other is difficult. Time constraints simply leave little time for this skill building.

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(2001) (examining reasons for and against the inclusion of sales of electricity within Article 2 and concluding that there are strong policy arguments for applying Article 2 to the sales of electricity when the industry is deregulated to an increasing degree).

115. The answer in the Commonwealth of Massachusetts is affirmative. See *Vassallo v. Baxter Health Care Corp.*, 696 N.E.2d 909, 921-24 (Mass. 1998) (implicitly recognizing that Article 2's implied warranty of merchantability was applicable although the verdict for plaintiff was sustained on the grounds of negligence). In Massachusetts, U.C.C. section 2-314 is applied as a substitute for Restatement Torts (Second) section 402A. See, e.g., *Ferragamo v. Mass. Bay Transp. Auth.*, 481 N.E.2d 477, 482-83 (Mass. 1985); *Correia v. Firestone Tire & Rubber Co.*, 446 N.E.2d 1033, 1039-41 (Mass. 1983); *Back v. Wickes Corp.*, 378 N.E.2d 964, 969-70 (Mass. 1978). *Back*, *Correia*, and *Ferragamo* all demonstrate that in cases of personal injury and wrongful death, Article 2's implied warranty of merchantability is construed as allowing a tort-type action in Massachusetts. *Ferragamo*, 481 N.E.2d at 483; *Correia*, 446 N.E.2d at 1039-41; *Back*, 378 N.E.2d 969-70.

116. The answer is maybe, depending upon the test judicially adopted for U.C.C. coverage under the scope sections; that is, U.C.C. §§ 2-102 and 2-105(1). In the famous case of *Anthony Pools v. Sheehan*, 455 A.2d 434 (Md. Ct. App. 1983), the court applied U.C.C. warranty law when a man claimed injury due to an allegedly defective diving board which was removable. *Anthony Pools*, 455 A.2d at 439-41. The case depended upon Maryland's non-uniform disclaimer section, the fact that the plaintiff was a consumer, and the fact that the component alleged to be defective retained its identity after the pool's construction. *Id.* at 441. The test applied was dubbed the "gravamen of the action" test. *Id.* at 440-41 (citing 1 W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-102:04 (1982)).

117. It depends upon the jurisdiction. Compare *Mattoon v. City of Pittsfield*, 775 N.E.2d 770, 784 (Mass. App. Ct. 2002) (holding that Article 2 did not cover a city's provision of water to its citizens) with *Zepp v. Mayor & Council of Athens*, 348 S.E.2d 673, 677-78 (Ga. Ct. App. 1986) (holding that the sale of water by a municipality was a sale of goods governed by Article 2 of the U.C.C.) and *Sternberg v. New York Water Serv. Corp.*, 155 A.D.2d 658, 659 (N.Y. App. Div. 1989) (holding that while the furnishing of water by a municipality was a sale of goods under Article 2, no warranties were implied in the sale).

Therefore, when a complex fact pattern generates arguments that need to be developed in a meaningful way over time, it will nearly always be necessary to assign someone to prepare an argument in advance of class. Unless it is a very small class, asking *everyone* to prepare an argument tends to cheapen the exercise, meaning nobody will make a very good one. Consequently, there can be room for classroom arguments if the problems are presented at least a session early, and the players are in place with reasonably clear instructions. Alternatively, time permitting, give the students a few minutes to build arguments on fresh facts presented in class. I view arguments in class on fresh facts as a new case in practice; avoid negative judgments and let everybody's ideas come forth, shifting wheat from chaff later. If you bear down too much or import negativity at this stage, students will clam up, leaving the classroom quiet and rendering the time unproductive.

### 3. *Issue Spotting and Developing Arguments in Complex Fact Patterns*

The foregoing levels of problems are self-evidently academic exercises, nothing to despise, but surely not exercises that stretch minds, demand rigorous thinking, or prepare students very much for any practice. If we move on to fact patterns more like those that might turn up in a law office, things can get messy in a hurry. If a prospective client comes in from the street, the story will usually be somewhat garbled, facts overly abundant or incomplete, and procedural issues, contract issues, tort issues, restitution issues, property issues, and others might be lying in a muddy fact pattern only partially discernible when a client first appears. What must the lawyer do? Obviously, facts must be sorted and legal theories tentatively tested to decide preliminarily whether the firm wants the case, and if so, what the next steps must be with an eye on pleadings, discovery, negotiations, and possibly arbitration or trial. At any stage, there must be issue spotting or identification of possible legal issues around which discovery can be done and a case or defense can be built. In the normal course, all of this plays out in slow motion and involves multiple legal sub-disciplines.

A challenge in any contracts or commercial law course (unless it is a seminar setting) is to find or write doable problems that drive students reasonably deep into a realistic and challenging factual situation. Old tests and quizzes and recently reported cases can be great resources in this endeavor. On problems at this level, students *definitely need time and concrete expectations* to make the exercise worthwhile, and it is sensible to involve several students in trying to find issues. Beyond issue spotting, and testing theories, it is legitimate to press students to make plans for

investigation and discovery, even if they have not formally studied rules of discovery.

If students are asked to write out any pleadings, motions, memoranda, or the like, such an exercise moves toward performance testing, surely a worthwhile prelude to practice or bar examinations. It has been my failing to use too few major problems in contracts and commercial classes. My excuse has always been want of time, in the belief that I need to cover U.C.C. sections and Restatement sections and cases. However, on those occasions, mostly in review sessions or as part of remedial help, when I have granted liberal time and requested either written answers or entered into lengthy dialogue with students, the results have been rewarding. If I find the courage to spend more time on carefully drawn problems (freshly drawn with no answers available) and less on case analysis and commentary, it will probably be time to retire.<sup>118</sup>

#### 4. *Evaluating Arguments for their Strengths and Weaknesses*

If anyone makes any effort to use problems of any complexity, evaluation of argument is probably built into any in-depth discussions that surround issue spotting and argument construction. Students will naturally shoot down arguments contrary to their own, and a professor wittingly or not will tend to evaluate the strength of arguments. I set out this sub-part about evaluating arguments for a particular reason: I do not think that we should leave students with the notion that because an argument can be made, it ought to be made in the law office. Cases built upon weak arguments clog up judicial processes, cost somebody money, and leave freshly minted lawyers with angry clients, senior associates, or partners. *Judgment* about the weight of arguments is hard to learn, and even harder to teach, but I think we ought to inject into legal education at any early stage the necessity of honing the skills of evaluating arguments and judging some arguments as truly not worth the bother.

#### 5. *Summary*

A sophisticated reader might view the foregoing discussion about possible uses of classroom time as tedious and unnecessary. Some good teachers might view what I have set forth as positively wrongful in the sincere belief that we are at the threshold of a new age of legal education, an age where inter-active learning of a higher order, greater use of

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118. Any suggestions or reflections on a moving more fully to a problem method from any seasoned professors would be heartily welcomed.

technology, and possibly distance learning will displace the traditional large classes in contracts and commercial law. It is true that my discussion of using classroom time assumes the continuing viability of teaching large sections in these subjects. Maybe that is a backward look toward a system that will soon be rendered obsolete. If something better is over the horizon, I will welcome it. Yet, given the economic realities of legal education, and the strength of tradition, I suspect that the challenge of using fixed quantities of classroom time for classes of one hundred students or more in these subjects will be with us for a long time.

I take a little solace in the observation of Dean Griswold:

Many people have criticized Harvard Law School because of its general use of relatively large classes. My own reaction has been, though, that nearly everything turns on the teacher. There is no doubt, in my mind, that a large class with a well qualified teacher produces far more education than a small class with a teacher who is inarticulate, and lacks the verve, and the ability to project his voice, which helps to communicate his thoughts to his students, and make the thoughts come alive.<sup>119</sup>

## V. TESTING AND COUNSELING

In putting your first exam together, be prepared to encounter an almost universal phenomenon: a new teacher's first exam is always much too difficult. Much too difficult.<sup>120</sup>

My first examinations were much too long and drew a fair number of negative reactions. An examination that is too difficult, too long for the time allotted, or worse yet, covers material about which students did not expect to be examined will generate hostility and lead to distrust of the professor. If you draft an examination and inwardly feel that it is not reasonably doable within the time allotted, delete parts or rewrite the examination from scratch. If you proof-read your examination, and the thought flickers in your mind that some of the students may be justifiably confused by a question, call time-out for yourself and think of a way to clarify the question. Most law students take examinations very seriously, and even those who have not mastered the pertinent subject matter will see no humor in a badly drafted examination. Students will not be light-hearted about any grade that telegraphs poor performance if the examination was deemed unfair. Therefore, a professor cannot treat the final examination (or

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119. GRISWOLD, *supra* note 81, at 114.

120. Whaley, *supra* note 1, at 137.

quizzes) as merely inconvenient, but necessary appendices to a course. The examination must be the logical culmination of the course, and quizzes along the way should clarify and correct misunderstandings. Our current legal academic culture allows for nothing less.

Traditionally, law school examinations have called for essay answers. Multiple-choice questions are now frequently used. Papers in seminars and traditional courses are common, and evaluations by other means such as assessments of simulation exercises or internship work are increasingly used. If you are teaching contracts or a commercial law course, what methods of examining are preferable? Or what mixture of methods makes sense? I offer mainly my own opinions, but begin with a baseline assumption: that most law professors have not had a serious immersion into psychometrics, the discipline devoted to measuring intellectual capabilities and achievements.<sup>121</sup> If you have been immersed, my observations may seem simple or crude; however, if you came to law teaching or are continuing in teaching without the benefit of any systematic study of psychometrics, my own thoughts may resonate with your experiences and apprehensions.

#### A. BASELINE CONCERNS FOR CONSTRUCTING TESTS (EXAMINATIONS AND QUIZZES)

In my early days at New England School of Law, I was provided with a two-volume set entitled, *Learning & Evaluation in Law School* by Michael Josephson.<sup>122</sup> Our administration also brought in Mr. Josephson for an in-house discussion on multiple choice testing. The concepts that I absorbed from the foregoing volumes and from Mr. Josephson's presentation have stayed with me. Although a vast quantity of literature relating to law school learning and evaluation has been generated in the past twenty years, it seems that the fundamental concepts presented by Michael Josephson remain sound and relevant today. In his terminology, the three prerequisites

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121. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1833 (2002). The definition of the term "psychometrics" in *Webster's Third New International Dictionary* reads as follows: "1. a branch of clinical or applied psychology dealing with the use and application of mental measurement. 2. the technique of mental measurement: the use of quantitative devices for assessing psychological trends." *Id.* In my experience, the term seems to have gained respect as a short-hand way of discussing ways and means of evaluating students' work in law school.

122. MICHAEL JOSEPHSON, *LEARNING AND EVALUATION IN LAW SCHOOL* (1984). The appendices contain the work of many persons other than Michael Josephson. Much of the discussion in my text is based upon my understanding of Josephson's ideas, which I have found very useful over the years. Although more than twenty years have elapsed since the publication of Josephson's work, I believe that his basic conceptions and insights remain valid and are very useful for a new law teacher struggling to draft or modify either essay or multiple-choice examinations.

to a good law school examination are *validity*, *reliability*, and *fairness*.<sup>123</sup> No matter how sophisticated law school evaluations might become, I question whether these basic concepts will ever become irrelevant; hence, I will talk about each, though they are interrelated, and to some extent overlapping.

For the sake of consistency, I will use the term *test* as the overarching term referring to all means of evaluation by written questions and answers, apart from seminar papers. I will use the term *examination* in reference to the relatively long end-of-semester written tests, and the term *quiz* in reference to the relatively short during-the-semester tests. Both examinations and quizzes can be traditional essay, short answer, or multiple-choice. I will not venture into evaluations of seminar papers, that is, researched papers on selected topics. I will offer a few comments on adjusting grades according to class participation.

### 1. *Validity*

*Validity* means that “the test must effectively measure student competence with respect to the various instructional objectives of the law teacher.”<sup>124</sup> While a deep conversation about this multi-faceted concept is beyond me, the essential point is *content validity*.<sup>125</sup> Accordingly, “a test is valid if it accurately measures the student [student achievement] in respect to the instructional objectives of the course.”<sup>126</sup> A test is valid if it accurately measures what the tester wants to measure, but it is invalid or worse if it measures something other than what the tester wants to measure. Hence, a test of any description must be designed to measure instructional objectives. Attaining testing validity, therefore, is one argument for thinking through and articulating instructional objectives when a professor constructs a syllabus for the course. There ought to be a discernible correspondence between objectives of a course and the contents of any test given in or at the end of the course. Validity is variable, meaning it is not all or nothing, but can run from one hundred percent to zero. I suspect that on most tests it is neither wholly missed nor wholly attained. As a practical matter, we need not discuss validity or the want thereof, but rather strategies for raising validity as high as practical. Validity is varied from the optimum downward if a course has multiple substantive learning objectives, and the testing touches upon only a few objectives. In most

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123. JOSEPHSON, *supra* note 122, at 5-6.

124. *Id.* at 5.

125. *Id.* at 7.

126. *Id.* at 8.



courses, professors, out of necessity, test only selected topics because it is not practical or reasonable to test every topic and sub-topic covered in the course. Yet, in designing tests we must be aware: when we omit issues, we are precluding students from showing their stuff on those issues and risk some degree of invalidity by purporting to evaluate achievement on the whole of a course by testing only some parts. Of course, the problem is greatly aggravated if topic selection is arbitrary.

Beyond striving for reasonable correspondence between course content and test content, Josephson lists three factors that tend to undercut validity: (1) imprecise calls of the question; (2) interdependence of tested material; (3) and test items that presuppose knowledge not taught in the course.<sup>127</sup>

## 2. *The Call of the Question*

The *call of the question* simply refers to the directive or interrogatory that specifies what a student is supposed to do.<sup>128</sup> The call of the question can be exceedingly broad, e.g., “Discuss the rights of the parties” or it can be narrow, e.g., “Does D have a statute of frauds defense?” Narrow calls of the question can be rightly objected to because such questions eliminate a mental step, which a teacher can legitimately expect of a student, namely, plucking a precise issue from a fact pattern. On the other hand, broad calls of the question can generate invalidity if the calls are reasonably subject to different interpretations and lead different students to write on different things. A test drafter needs to strive for a reasonable middle ground. The call of the question should be narrow enough so that prepared students are channeled toward addressing the same issues but broad enough to challenge the students to find what precisely is in issue. There is no doubt a direct relationship between validity and the degree to which the call of the question can reasonably be read by many students as calling for a similar kind of response.

Above all, the call of the question should not *mislead* students into addressing an issue that the drafter did not intend to have addressed. To my chagrin I recently drafted a fact pattern involving an owner, a prime contractor, and a subcontractor, and set up the facts so that the subcontractor might arguably have a claim in restitution against the owner.<sup>129</sup> In my call of the question, I mistakenly asked whether or not the

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127. *Id.* at 9.

128. *Id.*

129. *See, e.g.*, *Commerce P’ship 8098 Ltd. P’ship v. Equity Contracting Co., Inc.*, 695 So. 2d 383 (Fl. Dist. Ct. App. 1997) (delivering a similar factual scenario upon which the fact pattern was loosely based).

subcontractor had any rights against the *prime contractor*, a terrible question since, in the fact pattern, the prime contractor had been discharged in bankruptcy and the pattern showed no evidence of a fresh promise after the initiation of bankruptcy proceedings.<sup>130</sup> More than one hundred students dutifully tried to make sense of the question; some guessed that I had wrongly phrased it and rephrased it themselves; some tried to answer it literally suggesting that a fresh promise by the prime contractor might be implied; a few suggested politely that the question did not make much sense; and a few tried all of the above. I scored the responses with great liberality. This experience demonstrated much about the ingenuity and decency of my students. However, I doubt the question did much of anything to test across the board whether or not my students understood the requisites for an action in restitution in that particular context which was my objective in drafting the problem. Whether seasoned or new to teaching, care in reviewing the call of the question is exceedingly important. I recommend confessing error and grading liberally when a call of the question turns out to have been demonstrably misleading.

### 3. *Interdependence*

The problem of interdependence of tested materials means that a test drafter should avoid making “the response to one question or one part of a question entirely contingent upon correct analysis of another question.”<sup>131</sup> My most flagrant violation occurred early on when I was teaching the law of negotiable instruments. I drafted a fact pattern wherein an instrument (according to my intent) was supposed to be negotiable. Once a student made the decision in favor of negotiability, I expected the student to apply certain rules contained in Article 3 of the U.C.C. The problem inherent in the fact pattern (which I did not discern while drafting) was that a competent student could argue that the instrument was not negotiable under Article 3, in which case the rules of the common law of contracts would become applicable, unless one used Article 3 by analogy. More than one student argued competently against negotiability and then either stopped altogether, or simply made a general reference to common law of contracts. The perfectly rational decision to boot my hypothetical instrument out of Article 3 denied such students the access to the remainder of the problem; consequently, for such students I was no wiser after the examination as to

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130. See RESTATEMENT (SECOND) CONTRACTS § 82 (1981) (allowing for enforcement of a promise to pay all or a part of indebtedness discharged in bankruptcy, subject to conditions, if any, imposed by federal bankruptcy law).

131. JOSEPHSON, *supra* note 122, at 12-13.

whether or not they understood certain rules from Article 3 than I was beforehand. The scope of the problem is inherent in many U.C.C. concepts, e.g., the merchant concept. If a drafter makes a problem contingent upon a person having merchant status,<sup>132</sup> and a student reasonably or not argues against merchant status, the reader will have no clue about what that student would have written if the initial decision had been opposite. While the problem of interdependency probably cannot and should not be wholly eliminated, since *some degree of interdependency exists within the doctrinal framework of virtually every part of law*, a professor who cares about testing should be careful to avoid structuring tests in such manner that answering one question contrary to expectations automatically shunts students into an intellectual space isolated from rules or concepts into which that professor wants to probe.

#### 4. *Presuppositions About Things not Taught in the Course.*

The third special factor bearing negatively upon validity is using fact patterns or test questions that presuppose knowledge or skills not taught in the course. This factor is never wholly avoidable since all American law schools instruct in English and (so far as I have discovered) all require students to be examined in the English language. Anyone who has taught the raw talent pouring into law schools from hundreds of undergraduate programs recognizes a broad spectrum in writing abilities, knowledge of the English language and of American history, and more generally knowledge of Western Civilization. This is understandable, especially considering the many immigrant students and students of immigrant parents whose understanding of what counts as pertinent history or good written English varies greatly from that which may traditionally have been expected in elite preparatory schools. It is increasingly apparent that what counts as acceptable written English is not uniform in undergraduate programs, nor necessarily uniform among law professors. So the question as to how much writing skills should count in scoring essays is, in my view, not answerable in any definite way. Some professors will openly acknowledge grading in part on writing skills; others purport not to do so. My own view is that, given the importance of writing skills in nearly every law job, law professors can rightly insist upon a reasonably high degree of excellence in papers and take-home examinations, and a modicum of proficiency in timed

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132. "Merchant" is defined in U.C.C. section 2-104(1) and is important for the applicability for many sections and subsections following, such as sections 2-201, 2-205, 2-207, 2-314. U.C.C. § 2-104 (2001).

essays. In any event, when we score on whether or not an argument is clear and cogent, we are to some extent evaluating writing skills.

Apart from any debate about justifications (or the lack thereof) for grading on manifested writing skills, there are two discrete areas where reliance on matters extraneous to the course as taught can be problematic: assumptions about vocabulary and assumptions about rules and concepts from other subjects taught in law school. On these points, a test drafter carries a burden. The fact patterns and call questions should be drafted to avoid use of terms with which students might be unfamiliar, including trade terms, commodity names, or geographic designations, unless the drafter also provides a definition or explanation. Even more, the drafter should not use terms from Latin or Norman French unless those terms have been designated for mastery in the class. Misunderstanding a term may divert a test taker into a faulty line of analysis. More commonly, non-comprehension simply frustrates a test taker or generates an unnecessary volley of questions directed toward the person proctoring the test. More to the point, injecting vocabulary extraneous to the course into any test, when the students have an uneven understanding of the vocabulary used, winds up testing the students on their pre-law education and cultural background more than on the subject matter of the course, a tactic that raises serious questions about validity.

The same problem is inherent in making assumptions about concepts or rules supposedly learned in other courses in law school. A professor can wittingly or unwittingly presume that any student coming into his or her U.C.C. class, for example, ought to know any number of concepts and rules from civil procedure, torts, property, and most of all, contracts. Consider the simple tort of conversion, which might be given scant coverage in a torts class. The presumption that students studying Article 3 understand conversion might or might not be justified; but the plain fact is that if any student has not studied this cause of action, and the professor teaching Article 3 neither explores it nor directs students to learn it from a non-Code source, any test question contingent upon an understanding of conversion is a set up for distorted or partial answers.<sup>133</sup> Likewise, a professor teaching Article 2 might presume that students come from a contracts class with an understanding of the law of third party beneficiaries. Justifiably or not, a professor might pass over the law of third party beneficiaries in a contracts course. If a sales teacher, thereafter, drafts a test question assuming that

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133. See U.C.C. § 3-420 (2001). In a sense, this section covers conversion, but only by incorporating the common law definition and the requirements of proof as a baseline for an action for the conversion of a negotiable instrument. See *id.*

students in the class understand the basics about third party beneficiaries, and the assumption is incorrect, the test item in question will not yield valid results.<sup>134</sup> Hence, for the sake of validity, the test drafter should not make any test questions contingent upon an understanding of rules or concepts neither taught nor articulated as prerequisites for the course.

### 5. *Reliability*

Reliability overlaps with validity, meaning that some factors that tend to make test results unreliable also reduce the validity of the test, but reliability merits separate thought. Reliability “refers to the consistency with which a test assesses whatever it is supposed to measure.”<sup>135</sup> The key term is *consistency*. Just as an unrepresentative sampling may reduce the validity of a test, a sampling that is arbitrarily chosen reduces reliability. A drafter can avoid problems of unreliability, to some extent, by making a checklist of issues or doctrinal points to be tested and following it in drafting problems. Without at least a rudimentary checklist, the drafter is subject to his/her momentary thoughts. Topics recently covered or those that stick in the mind may dominate the test even though they were not put forth as major topics during the semester.

A related concern is *scoring inconsistency*, a problem especially related to any essay grading. Anyone scoring must read with a set of objectives or a model answer in mind. Otherwise, scores will be wholly impressionistic. A grader need not be enslaved to a checklist. Often, a worthy paper deviates from what the test drafter sought or expected, mainly because the writer rightly perceived a topic raised in the fact pattern or call of the question beyond the intent of the drafter. That perceptive student should be rewarded, not punished, even though the arguments made or conclusions reached deviate from the model answer or checklist of issues. Nonetheless, consistency requires some advance understanding of what counts and how much. Herein lies the reason for the model or checklist in advance of scoring. I find that making a tentative and succinct list of issues and answers, which can be adjusted after reading several student answers, gives a boost of confidence about being able to score with consistency.

Consistency in scoring is also contingent in part upon freshness and mood. I would advise any teacher to avoid scoring tests if you are angry or distraught. It is necessary also to avoid extreme fatigue. Falling asleep

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134. See U.C.C. § 2-318 (2001). There are three official alternatives for third party beneficiaries. See *id.* But the alternatives are scarcely intelligible if a person does not understand the problem that these alternatives were designed to solve.

135. JOSEPHSON, *supra* note 122, at 15.

reading blue books is a sign that the reliability of the test scores may be in jeopardy. Reliability requires that the scores awarded are not attributable to factors extraneous to a student's work product. Hence, those of us charged with the task of scoring tests requiring any exercise of discretion must strive to score all tests under reasonably similar circumstances with the same criteria in mind. It follows that significant temporal gaps in scoring the same problems for a large class are a possible source of inconsistency and ought to be avoided, as should any factors tending to be personally distracting, including family or home-related issues. I prefer to score essays away from law school, and away from home, unless the family is gone. Local libraries, especially in quiet suburbs, often offer a valuable haven for scoring essays.

## 6. *Fairness*

Fairness in an expansive sense encompasses both validity and reliability, but fairness involves separate concerns also. Fairness requires that the students play on an even field. Nobody should have any relevant information that is not accessible to others. All information reasonably necessary to prepare for the test should be made available at a reasonable time in advance of the test. If all students have access to a website and information is timely posted, a posting will do, but if anybody for any reason cannot access the site, hard copies should be available. At New England School of Law, we are required to have sample questions and answers on the school's website. As a precaution, I keep a few hard copies around should anyone need them. By whatever means necessary, students should have a reasonable notice of the subject matter to be tested. Moreover, they need to know the procedural rules, for example: Must everything be written in black ink? Is it allowable to write on both sides of a page? Are there any page limits on essays? Fairness is good faith adapted to the teaching and testing environment.<sup>136</sup>

Testing is no time for trickery. Nobody taking the test will brush it off lightly if he or she feels ambushed by the unexpected or disadvantaged because others had greater access to pertinent information. In the course of assisting students as they prepare, office conferences and review sessions can be delicate. Office conferences with one or a few students create

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136. U.C.C. § 2-103(1)(b) (2001). I often tell contracts and commercial law students that I am binding myself to the merchant's standard of good faith and fair dealing embodied in U.C.C. § 2-103(1)(b). "Good faith" in that section means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." *Id.* No professor can give perfect examinations or award grades that are perfect reflections of student performance, but every professor can be honest and should strive to adhere to the standards set by the best professors in legal academia.

situations where furnishing information not presented or referred to with specificity in class, or telegraphing the importance of a case or doctrine, can occur in a flash. A student in private will often put forth a question in such a way that the answer in full would be an outline of a good answer to a problem already drafted. If the professor punts, the student may either think the matter is unimportant or may shrewdly figure he or she has hit upon something sure to be featured on the test. The professor cannot in good faith dodge the question, and needs to proceed with a pedagogically sound response avoiding disclosure of what is on the test or laying undue stress upon that which the student is asking. Similarly, in scheduled review sessions open to the whole of the class, there may be a temptation to over-disclose, either as to test content or as to particular doctrines or sources that could be most helpfully consulted. One could view helpful revelations in this context as a reward for attending a review session, but unless the session is required, some students may view such disclosures as illicit tips for those most inclined to spend time in conversation as opposed to private study. Fair or not, the disclosure could have the appearance of unfairness. The construction of quizzes and examinations, advance counseling, and the administration of any sort of test should not only *be fair*, but the entire process should have the appearance of fairness. Many students have given me much gratification by saying, sometimes after graduation, that my tests were very hard, but that they felt alright about the experience because the process was fair.<sup>137</sup>

#### B. DRAFTING PROBLEMS FOR ESSAY ANSWERS

Try to avoid objective exams. . . . They are a snap to grade, but they rarely test anything more than surface knowledge of detail, saying nothing about the students' understanding of the course or their eventual performance in this area as lawyers.<sup>138</sup>

While I have a little higher view of using multiple choice questions than does Professor Whaley, my own opinion is that the major part of testing (especially in contracts) should be in an essay format, preferably essays that require arguments or letters of advice to a client or judicial opinions on questions rooted in fact patterns. Good problems that call for essay answers can move near to performance testing, albeit it with fairly simple facts and limited resources. Professors may prefer few or many

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137. Naturally those who thought that the tests were unfair have little incentive to get in touch.

138. Whaley, *supra* note 1, at 138.

issues. I prefer to err on the side of planting two or three issues at most in a fact pattern, having discovered that insightful students tend to write on a few issues I never intended to plant. If unintended issues can be realistically discovered in the fact pattern, without importing significant facts by a liberated imagination, then the essays on unintended but rightfully discovered issues should count. Therefore, to avoid undue complexity and extreme variations in essays, and the consequent challenge of attaining uniformity in scoring, it makes sense to rein in any desire to make a fact pattern into an Easter egg hunt.

For ease of writing and scoring, I prefer that fact patterns on average be one page single-spaced. Wedging the essential facts for a decent problem into a one-page fact pattern can be a challenge. The discipline of pruning a fact pattern a few times before using it in a test is a wholesome discipline. I prefer relatively short fact patterns so that I can limit the writing time to thirty or thirty-five minutes per problem, a substantially shorter time than was customary in my own law school days. Less time per problem leaves time for more problems. More problems allow for a wider scope of testing. Our school does not impose any time limits on examinations, so for a three-hour course I often allow four hours for a final examination, meaning the students may have seven or eight problems. Testing on a broad range of doctrines and assigning a variety of tasks, e.g., client letters, memoranda for senior partners, arguments that might be made for or against motions, or merely legal arguments for one view or another, gives the reader a reasonably clear vision of what the student can accomplish. The wider the opportunities to demonstrate achievements, the higher the accuracy in evaluating—so long as writers are not worn out. I have found no bitterness at long and challenging tests, so long as the tests are viewed as fair.

Some of my colleagues use short answer questions, that is, questions that can be answered in two or three sentences. When I took a course in banking law at the Morin Center at Boston University Law School a few years ago, the professor gave a very challenging four hour final examination, part of which consisted of short answer questions. Such questions greatly increased the scope of the materials tested. I think short answer questions can be helpful for broadening the scope of an examination, but there is a constant danger: students will tend to invest more time than the questions merit, shorting themselves on time for the parts that count more. I suspect that most of what can be tested well in short answer questions can probably be tested as effectively and more efficiently with multiple choice tests. Yet, combining these with essays also presents a danger that the students misallocate time to the multiple choice questions leaving themselves cramped on writing essays. Consequently, I have found myself



moving toward single mode testing: wholly multiple-choice on quizzes and only essays on final examinations. I think validity and reliability have probably been enhanced by that move.

### C. TAKE-HOME ESSAY TESTS

The best essays I have ever received have been on take-home sales examinations given in summer courses. Since the classes were small (usually about twenty students) and long papers were manageable, I gave hard problems, and, in accord with our rules, allowed three or four days for answering. The great majority of the students worked very hard, often turning in forty to fifty-page answers that showed solid analysis, great use of authorities, and usually considerable polish. The answers in many ways outran good seminar papers. Reading them was so gratifying that I have pondered whether or not all commercial law courses should be evaluated in that manner. I have not generally done so for two reasons: students report having expended a great deal more time than I expected them to expend, possibly running tight on time for other courses; and, the time allowed to do the work means that students can avoid *consolidating* their knowledge of the subject matter.

One positive feature of the pressure of time-sensitive examinations is that students tend to work hard to gain a sense of the whole course so that the pertinent pieces can be drawn upon automatically. Gaining that sense of the whole has positive values. One is that students, as a practical matter, are gaining knowledge and skills that can be helpful in preparation for bar examinations. Another positive value of working hard to master a substantial body of material is that the exercise is excellent training in mastering and retaining complex sets of facts for a time, a skill necessary for those who will litigate successfully as well as for those who will do commercial transactions. Until I tried and arbitrated construction cases, I had no clue as to the detail a lawyer needs to call up instantaneously to do a good job. Whether open book or closed book, a time-pressured examination usually does induce mastery. Therefore, while take-home examinations may bring forth deeper, more detailed, and better answers, I have doubts about doing away with time-sensitive examinations, especially for contracts, but also for other commercial law courses. Moreover, on any examination, getting *realistic feedback* from the students is vitally important, so that a professor can discern what he or she has accomplished or failed to accomplish during the course. Discovering what the students do not know and cannot do is

important information for adjusting the course.<sup>139</sup> The value of such feedback is diminished if the examination writers have had time to do substantial research before writing the answers, because the answers may show much about research skills and little about what, if anything, was accomplished in class.

#### D. MULTIPLE-CHOICE EXAMINATIONS (OR QUIZZES)

For reasons of scope, efficiency, and objectivity in scoring, multiple-choice questions have become more popular than was the case when I began teaching in the 1980s. As I recall, during my own student days, I only had one multiple-choice examination. I liked the multiple-choice format mainly because it allowed for broad coverage. Recently, I have observed that some of my colleagues test exclusively with multiple-choice questions. That may be defensible and wise for some courses. However, for contracts and commercial law courses, I much prefer that answers to multiple-choice questions count at most twenty to thirty percent of the total grade. I believe that *generally* students need to do more in-depth thinking to write acceptable essays than to answer multiple choice tests successfully. Additionally, the professor gains a much fuller appreciation of strengths and weakness if the students are compelled to write essays that really count. My belief may be partially attributable to my own apprehensions about the quality of my own multiple-choice questions.

Appropriate standard multiple-choice questions, not generally available to the students, are hard to find. Consequently, many professors who use multiple-choice questions will wind up drafting their own. That being the case, it is no mystery why these questions are guarded carefully. Given the time investment to make valid, reliable, and fair questions, few professors would want to start each time from scratch when he or she teaches the course repeatedly. For this reason, a new professor will wind up either drafting multiple-choice questions or tweaking standard old questions to fit his or her objectives. For drafting multiple-choice questions, I submit that the first thing to do is to establish the purpose or purposes for the testing. I recommend using multiple-choice questions simply to test the students' understanding of cases covered in the casebook and to test whether or not they can recognize correct applications of doctrine as well as doctrinal errors. Each objective is defensible and valuable. I am suspicious about testing rigorously on high analytical skills through multiple-choice

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139. I count such feedback doubly valuable on quizzes, but important also on final examinations in courses I plan to teach again.

questions, unless there is time to discuss, review, and tweak the questions well in advance of administration.

I have found that testing on cases is a reasonable and efficient way to test whether or not students have really grasped the procedural histories, issues, holdings, and the articulated reasons for the decisions in cases covered. Rather than charging students with the task of remembering every fact pattern and the details from the reported cases, I provide a citation to the case, a long paragraph summarizing the reported opinion (often including some procedural history), and then create four choices from which I ask the students to pick the most descriptive of the court's decision as reported. Two of the four choices will normally contain some assertion seriously at variance with the court's opinion. Two choices will be quite close to the law and the facts of the reported case, but one will be slightly at variance with the case report making it the less accurate choice. The call of the question must always ask for the *best* or *most accurate* statement about the case as reported. When first-year students commence to answer these kinds of questions, many tend to trip on misunderstandings about the procedural histories of the cases or discover that they really did not understand the holding or rationale after all. After one negative experience, many focus more on procedural points and the precise issues decided, which makes them better case readers. This manner of testing also rewards careful preparation for class and tends to induce not only class attendance, but also diligent preparation and close attention to distinctions and clarifications made in class.

My second main use of multiple-choice questions is to provide a means of testing, the degree to which students can closely scrutinize statements to find doctrinal error or correct applications of doctrine in very compressed statements. Making tiered questions can make this exercise more challenging. For example, I may write out four brief statements (scenarios) in which three display consideration given in exchange for a promise and the fourth does not. Thereafter, the call of the question can be: "In which of the statements #1 through #4 was there consideration?" The choices can be none, all, or any combination of the foregoing numbers 1 through 4. Restatement illustrations are a great source for compressed statements applying law to facts, as are some of the great treatises. Using these kinds of questions is tricky. A slight error will cause enormous confusion. I have had to request that the bubble sheets be re-evaluated to allow for more than one choice, which virtually renders that question valueless for testing, though learning may come of discussing the error. Taking the test a couple of times in advance and tweaking any fact patterns or choices that are ambiguous or even arguably confusing is necessary to avoid errors. Despite

the dangers and work required, some multiple choice testing can serve well to expand the scope of matters tested and to give students (at least in a rudimentary sense) a preview of the multi-state questions that they will need to answer to become members of the bar in most jurisdictions.

#### E. CONCLUDING CONCERNS

Some professors grade partially on class participation. I keep notes about class participation and do on occasion adjust a grade (boost it, e.g., B- to B) for extraordinary class participation.<sup>140</sup> I am in favor of strict limits on this practice lest it reward personalities rather than demonstrated performance on challenging questions. I also assign small papers in contracts: one on an ethics problem and one for original research on a question of law in a jurisdiction of choice. Projects such as these tend to generate high interest. If I were satisfied that long-term benefits were sufficient, I would move to more projects and less time-sensitive testing.

No matter what one's methods of evaluation, counseling after the evaluation is usually time well spent, especially if a student is troubled and sincere. A troubled student, or one whose law career is in jeopardy, is usually an attentive listener and a willing participant in trying to figure out what he or she needs to fix for success in law school and beyond. A caring professor needs to avoid encouraging the student who simply cannot handle law school. Yet, for the student who can adjust with the right guidance, post-test counseling presents the best of opportunities for a teacher.

I will avoid any lengthy discussion of my own process for scoring essay examinations. I simply make a score sheet for every bluebook examination and add quiz scores to the end of the sheet. Score sheets with a few comments are a great tool for post-test counseling, but can also serve as a reality check when raw scores are turned into letter grades. I have omitted any discussion of the use of software programs for turning raw scores into letter grades. Most incoming faculty will adapt more easily than I can to grading programs. There is little doubt that such programs offer a great tool for the conscientious grader. Yet, I fear that the importance of good *judgment* in grading might be obscured by over-reliance on technology. It is a given that no grading program can operate without input that sets the parameters for the results. Grading cannot be hard science. Like teaching, grading is an art. Grades transmit messages to students,

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140. At New England School of Law, the process of grade adjustment is quite formal. First, we turn in the grades to our registrar based on anonymous bluebook scores. Thereafter, we may take a list to the registrar's office of persons entitled to an adjustment. My tendency is to boost only at most five percent of a large class, sometimes a slightly higher percentage of a small class.

prospective employers, and others. A conscientious professor will maintain control of the messages. I never transmit my grades to the registrar without going through my score sheets to make certain that I am comfortable with the letter grades assigned to each compilation of numbers. Even with anonymous grading, the blue books betray much about a student's capacities and achievements. Anonymity should not obscure the fact that a professor is awarding a grade to a person, often a struggling person, who awaits the grade with much anxiety. This is assuredly not a cryptic argument for grade inflation. One aspect of a responsible professor's life is to award some low grades, occasionally a failing grade. I am simply making an argument for being very careful about grading and its correlative: avoid too much reliance on formulae and technology inasmuch as any perception of certainty thereby induced is illusory.

As most of us come into law teaching without special preparation in pedagogical theory or skills, so also most of us in the profession have moved into testing and grading without any special training. Maybe things will change. Perhaps some day there will be a certificate of some sort required for teaching law. However, I doubt that revolution is coming soon. Were it near, I would have difficulty joining the forces for radical change. Sincere and thoughtful teachers labor continuously to challenge their colleagues.<sup>141</sup> With constant reflection, serious interchange, vigilant observation, and prudent borrowing from the ways and means of other professional schools we can meet our challenges with confidence and good humor.

## VI. THE STRUGGLE FOR TIME: BALANCING COMMITMENTS TO TEACHING WITH COMMITMENTS TO FAMILY, SCHOLARSHIP, PUBLIC SERVICE, AND INTELLECTUAL GROWTH

Taking an academic job is, in many ways, less stressful than working in a firm, especially where the pressure is intense for high billable hours. Moreover, even though a decent professor will feel pressure to teach responsibly and to otherwise in good faith meet the obligations of his or her appointment, the demands in the academic setting will in the normal course not feel as weighty nor as draining as will the demands on counsel facing a trial in a bitterly contested case. I laud the practitioners in law offices large and small for the hard work that makes the legal system work. Teaching law is, indeed, a privilege that allows us to be somewhat insulated from the

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141. I am thinking of Gonzaga University's Institute for Law School Teaching. Aside from the semi-annual publication of *The Law Teacher*, the Institute sponsors the annual summer program on law teaching.

messier parts of the life of the law. Yet, anyone coming in from the outside should beware: a law teaching career does not provide *free time* for contemplation of the law, at least not as I thought it would, when I came into legal academia in 1987. Law teaching eats up time in ways that an outsider will seldom anticipate. Nearly everyone I know in the law-teaching profession has faced real issues of time pressure and fatigue.

#### A. TIME FOR THE FAMILY

I doubt that the Association of American Law Schools (AALS) or anybody else keeps statistics on celibacy or the numbers of children for which law professors on average are responsible. My situation as a professor has been complicated by working with my wife to raise three daughters, two of whom have special needs.<sup>142</sup> Home and law school have often been magnets in competition, each trying to pull me in opposite directions. I can only assume that for a single parent, most often a mother, the forces pulling in opposite directions are at times nearly unbearable. Teaching responsibly, being a worthwhile spouse, and playing a meaningful part in raising children requires considerable discipline. A discipline that can be most difficult to acquire is the discipline to stop working at law related subjects in order to truly take a break for family. It took me many years to decide that the old tradition of a Sabbath day was not a luxury, but a commitment going to the heart of preserving my inner life in the midst of teaching responsibilities.

I still fail, on occasion, to honor a Sabbath day by keeping it completely free from intrusions of legal work, but am close to success. Being close to success in this exercise is a vast improvement on not having begun. I only wish I had begun earlier. A true day of withdrawal can refresh one's mind and allow family ties to strengthen in multiple ways. I urge any man or woman in law teaching who follows any religious tradition to search out ways to use that sacred time while opting out of law school concerns. The practice will almost assuredly improve rather than hinder your professional life. If you are a committed secularist, maybe a secular Sabbath, well devised, can refresh and nurture your inner life lightening the burdens of the teaching profession. You need energy, freshness, and a sense of excitement to teach. You cannot sustain good teaching without disciplined withdrawal.

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142. My oldest daughter, Josephine Monserud, is moderately mentally retarded. My youngest daughter, Ingrid Monserud, is autistic. I set forth my family story in substantial part in an article on the law of special education. See Gary L. Monserud, *The Quest for a Meaningful Mandate for the Education of Children with Disabilities*, 18 ST. JOHN'S J. LEGAL COMMENT, 675, 678-683 (2004).

## B. THE CHALLENGE OF SCHOLARSHIP

Engaging seriously in scholarship is no luxury in the law teaching profession of our era. It is a bedrock necessity. Anybody coming into a tenure track position virtually anywhere in an American law school needs to consider whether he or she is ready to take on the demand for scholarly work, which means, in practice, *publishing* in law reviews or journals. In times past, many good and worthy teachers of the law did not publish, or published little. Though some might lament the change to higher demands for publications, I do not see the old days returning because law schools will simply and correctly (in my view) demand some reasonable and respectable scholarly publications as a condition of tenure. Hence, getting into teaching law means assuming a personal responsibility to publish scholarly articles or books.

A new teacher will normally feel a real tension between the obligation to teach well and the challenge to publish soon. While the tension may be normal, scholarship and teaching ought to be ultimately complementary. That implies that early in a career the subject matter of a professor's scholarship ought to be within the field of his or her teaching assignments. A chasm between scholarly work and the teaching load will enhance the normal tension and diminish the chances of cross-fertilization. The fruits of scholarship should normally flow into teaching, and teaching should stir up questions that can be engaged in scholarly research.

Many persons who have taught for less time than I have produced vastly more impressive scholarly writings, so I write here with some trepidation. However, I have enjoyed the scholarly enterprise and eagerly anticipate opportunities to study and write in days to come. In this light, I offer my own reflections on gaining a foothold as a legal scholar. In the beginning, finding time is difficult. Finding sensible lines of inquiry is essential. Professor Whaley suggested that a young professor should write out of a sense of personal outrage, presumably upon discovering law that offends.<sup>143</sup> Discovering law, or gaps in the law, that challenge your values, or at least generate a serious personal interest, is a good starting point.<sup>144</sup> Issues arise constantly from personal concerns about the law in relation to race, ethnicity, gender, and sexual orientation. Quite apart from these legitimate sources of concern that generate hot public discussions, there are

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143. Whaley, *supra* note 1, at 128.

144. See *supra* note 126 and accompanying text. Having two daughters with mental disabilities generated within me a deep concern about the development of case law bearing upon the meaning of the federal and state mandates for special education. That concern generated an article.

issues that quietly percolate to the surface of contract and commercial law without gaining much, if any, public attention. One such issue that has long irked me is the common preclusion of suits against manufacturers for lack of privity, when either a consumer or a commercial buyer suffers economic loss, apart from personal injury.<sup>145</sup> I believe that in many cases justice requires remedies against the manufacturer as a remote warrantor, especially when the immediate seller—who sold to the complaining buyer—is either insolvent or has successfully disclaimed all warranties. That conviction led me to write three articles that have generated at least a modest amount of discussion, though precious few judicial endorsements.<sup>146</sup> Yet, I do not count the many hours invested as wasted because my work contributed, albeit in a small way, to a reasoned discussion about a thorny issue. Being in a serious conversation within the legal academic community is sufficient for most of us, at least early on, as watershed law review pieces are few.

My main mistake has been to write articles that are too long, either by trying to take on sets of issues instead of single issues, by trying to analyze case law exhaustively, instead of selectively, and by failing to prune by seriously considering the probable audience.<sup>147</sup> If you are new to this profession, unless you already are sophisticated in your scholarly work, it is probably prudent to pick narrow issues for first articles. A narrow issue article allows a chance for mastery of limited material and provides a reasonable chance of publication within a fairly short time. Given the abundance of journals, if the issue is at all meritorious and your research has integrity and your draft is reasonably well written, there will be a journal waiting to publish it. Taking on a major multi-issue project or an ambitious overview of an area of law without adequate time for the job can be exhausting without being exhilarating. This is dangerous counsel, no doubt, to those who teach where a tenure piece needs to meet exceptionally high

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145. See U.C.C. § 2-318 (2001) (describing the alternatives recommended for state legislatures). Note that only the third alternative suggests any cause of action against a remote seller (non-privity seller) for economic injury alone.

146. See Gary L. Monserud, *Rounding Out the Remedial Structure of Article 2: The Case for a Forced Exchange between a Buyer and a Remote Seller*, 19 U. DAYTON L. REV. 353 (1994); Gary L. Monserud, *Judgment Against a Non-breaching Seller: The Cost of Outrunning the Law to do Justice under Section 2-608 of the Uniform Commercial Code*, 70 N.D. L. REV. 809 (1994); Gary L. Monserud, *Blending the Law of Sales with the Common Law of Third Party Beneficiaries*, 39 DUQ. L. REV. 111 (2000).

147. See Gary L. Monserud, *Interested Sureties and the Restatement of Suretyship: An Argument Against Tender Treatment*, 15 HAMLINE L. REV. 247 (1992). I doubt that tracing the development of an obscure point of suretyship law from the Seventeenth Century to the end of the Twentieth and writing one hundred pages on this topic was worth the three to four hundred hours invested when the audience was a dozen scholars or fewer.



criteria. If that is your situation, there may be no time early in your professional life to write single-issue articles.<sup>148</sup> If that is so, I suggest doing it post-tenure as a service to the profession. Punchy articles directed to specific questions are often more valuable to bench and bar, as well as to fellow teachers, than are lengthy articles that require several sittings for even a cursory reading. For the legal academic community, articles that focus upon the background of single cases can also be very valuable.<sup>149</sup> The scholars who can produce the compendious yet readable works in any discipline will always be few. For the sake of our sanity, such works ought to be the fruits of long service in legal academia, not the results of strained efforts in the beginning of a teaching career. On any scholarly project, an honest and serious critic of initial drafts can be an invaluable collaborator.<sup>150</sup>

Interdisciplinary scholarship, e.g., scholarship blending biological sciences and law, can be a marvelous path for the legal academy and the public. A law professor might, on occasion, hit upon a solution to a sizzling legal or ethical problem through careful and deliberate scholarly work.<sup>151</sup> In our time, interdisciplinary work is on the rise: Such work may be highly theoretical yet have a practical value for legislative law-making or for advocacy and judicial decision-making.<sup>152</sup> I have wondered in recent years, however, whether or not too much legal scholarship has become so far removed from questions that lawyers and judges ask as to be of marginal relevancy. The legal academy can become so fascinated with being part of

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148. That reader will find little in this essay of any merit for his or her scholarly ambitions.

149. See Curtis Nyquist, *A Tale from the Crypt*, 30 HOUS. L. REV. 1205 (1993). My colleague did much to bring to life the old case of *Gray v. Gardner*, 17 Mass. 188 (1821).

150. For reading preliminary drafts of my own articles, I am especially indebted to my colleagues, Professor Ron Chester, Professor Judi Greenberg, and Professor Dan Ticcioni as well as to my lawyer-wife, Ann Jones.

151. For example, consider the legal problems that will need to be resolved as distinctions will need to be made between therapeutic versus reproductive cloning.

152. The AALS president, Professor N. William Hines, has written a two-part essay entitled, *Ten Major Changes in Legal Education over the Past 25 Years*. See N. William Hines, *Ten Major Changes in Legal Education Over the Last 25 Years*, (Nos. 2005-3, 2005-4), AALSNEWS 1 (Aug. 2005), AALSNEWS 1 (Nov. 2005) [hereinafter Hines, *Ten Major Changes*]. Number 5 in Professor Hines's list of major changes is "Growth in Interdisciplinary Teaching and Research." Hines, *Ten Major Changes* (No. 2005-4) AALSNEWS 1, 1 (Nov. 2005). As partial explanation of and justification for the phenomenon, Professor Hines stated:

[T]he expansion of many law schools' curricula through the additions of courses dealing with complex social issues such as environment, health care, intellectual property, immigration, national security, international affairs etc., where exploring the intersections between law and other disciplines is pivotal, naturally generated a demand for law teachers with multi-disciplinary backgrounds.

*Id.*

If you are on tenure track beware: Make certain that the interdisciplinary article that you are working on will count as legal scholarship under your school's standards for tenure.

the academic culture—a worthy endeavor—as to forget whom we serve. Our scholarship, in my view, ought mainly be undertaken to serve the needs of the bench and the bar. In any event, *disdain* for the concerns and needs of the bench and bar has no place in legal academic circles. Scholarly writing, wherein a professor really tries to address a current issue, ought to be highly valued.

It is a sad fact that much hard-wrought legal literature gets few readers and even fewer readers who react constructively to the author. Investing hundreds of hours in researching and writing an article that generates little interest can leave a professor feeling as if his or her time and labor were bundled up and thrown into a deep well. Any writer or researcher whose work garners little attention might on occasion feel a tinge of melancholy on that account, but there are usually countervailing factors to consider. First, even if no person reads an article, work well done probably has enhanced the writer's competency enormously. Second, many articles are read in whole or in part without any communication to the author or citation in any reported opinion, and may, if well done, exercise a positive influence of which the author will have no notice. Third, it often takes a lapse of time before the article answers a question discerned by an advocate or judge or anybody else. A scholarly work well done may long be hidden and come to light when the time is right. Post-publication attitudes of patience and unconcern about the fate of your work bode well for mental health.

A writer of articles or books ought to be a reader and a constructive critic of work done by others apart from writing published rejoinders. A letter acknowledging a good article can be a tremendous morale booster. I count it as very unfortunate that when I am engaged in hard work on an article, even of minor scope, I fail to read much beyond sources necessary for finishing my project. I have seldom taken time to acknowledge a good piece of work by another, even if that person cited my work. Great articles pour in and pile up; it is often months before I make an effort to read them. Many of us in legal academia are probably visiting upon others a real injustice by concentrating so much on pouring forth more words that we scarcely have time to peruse the words sent our way by others. Time pressure so severe that it obliterates our capacity to appreciate truly meaningful scholarship by others in our chosen sub-disciplines is too much pressure. My hunch is that most of us teaching and writing in the contracts and commercial law area feel that way from time to time. I know of no way of escape, but again revert to the theme I set out above: for many of us narrow issue articles that allow the setting of reasonable boundaries of time

invested and pages generated may be a partial solution to the problem of time pressure and fatigue.<sup>153</sup>

### C. PUBLIC SERVICE AND CITIZENSHIP

Lawyering and judging are services rendered to the public. Neither lawyering nor judging can be anything meaningful apart from service to the public, unless those roles are perverted beyond reason to private advantage. Of necessity, teaching involves training others for public service. Yet, can we really be teachers in the best sense and be isolated from our communities to the extent that we avoid outside obligations of service and citizenship? The serious answer must be negative. Law professors cannot conscientiously live in a vacuum apart from society. A good law teacher is a decent citizen outside of legal academia. Of course, many high profile teachers do marvelous advocacy for hard-to-pursue causes. Others quietly do pro bono legal work in their communities or through school-related projects undertake advocacy or education on issues of public concern. I laud those efforts inasmuch as my services have been meager by comparison.<sup>154</sup> Out on the street, work for the poor or disabled could often do more for the diminution of injustices in our land and for the reputation of our profession than truck loads of worthy articles. I do not diminish the importance of careful thinking that characterizes sound scholarship; I merely believe that hard work for persons in the underclass or outer class or in any class not rightly treated should count morally as much as thinking about societal problems in the academic setting. But, surely there is something beyond legal or law-related pro bono work: I mean the law professor as informed citizen and community participant.

An oft-cited justification for public education is the preparation for participation in democratic institutions.<sup>155</sup> If we educate people generally

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153. As I have reached age sixty and have started on the downslope in teaching, I am convinced that substitutes for publication would probably enrich the teaching profession immensely. By *substitutes*, I mean meaningful and responsible stints in private law offices or governmental agencies for periods of six to twelve months. If we routinely rotated into real law jobs for a reasonable time every five to six years, I suggest that the bar would respect us more, and that academicians would gain a vastly elevated appreciation for lives in the law outside of legal academia. Would any medical doctors teaching in medical schools become as detached from clinical work as many law professors are detached from day to day law practice? If not, why should the legal academic profession allow for detachment over long periods?

154. My own minor commitment has been to service as chairperson of the Human Rights Committee for Minuteman ARC, Concord, Massachusetts. We try hard to evaluate living and working conditions for persons with disabilities to insure that they are enjoying their rights as citizens.

155. See, e.g., MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, EDUCATION LAW, POLICY, AND PRACTICE: CASES AND MATERIALS 16-21 (2005).

for participation in government at different levels, exercising the franchise and beyond, anybody having gained a legal education has not only an obligation of citizenship, but also an obligation of leadership when the occasion arises. Not everyone in legal academia ought to be running for elective offices, yet every town and city has an abiding need for citizen participation on boards, committees, and groups formed to solve problems great and small. As law professors, we dodge too much if we avoid all community commitments. Being committed means that we educate ourselves, make sacrifices, and apply ourselves to the hard work of building up our communities. If we hold ourselves above this sort of thing, we earn the distrust the public often displays. Citizenship is our unavoidable calling in our country, but balancing its demands against time for teaching, scholarship, and family commitments complicates matters immeasurably.

#### D. STAYING SANE WITH INTELLECTUAL OR ARTISTIC PURSUITS OUTSIDE OF THE LAW

Many persons who come into law teaching come with rich backgrounds in other areas, often literature or science or fine arts. Many bring hobbies. I came with an interest in history and theology, especially patristics. I would probably dry up inside if I only read law books. There may be a season when a professor begins teaching during which these earlier interests need to be set aside. Setting aside an interest need not mean extinguishing the yearning to pursue it. With a plan, the chance may come again to reawaken an old interest in music, or a technical study, or even an ancient language. When academic days are really heavy with obligations, and there seems no end in sight, it can be helpful to write a vision of things to accomplish at a distant date when things lighten up. A folder in your hard drive can hold many files of mini-visions. When the time is ripe, tap into the folder and carve out some time. During my own labors of the past twenty years, I have tended to allow the pursuit of non-legal subjects to wane. Now it is marvelously refreshing to return to old interests. Reuniting with interests of one's youth is to gain a greater sense of wholeness and a feeling of sanity in a world that seems fragmented and, at times, insane. I recommend to the new professor: Let your interests go underground for a time if you must, but guard and cherish your interests beyond the law.

#### E. THE CHALLENGE

The challenge for a law teacher is to be many things for many people simultaneously without losing a sense of purpose and freshness in teaching. As the sub-title to this essay suggests, every time a professor teaches a

course, it can be (I think it should be) as exciting as if it were his or her first time through the material. Keeping in touch with other teachers can be helpful. Nearly every issue of the *Journal of Legal Education* has some articles of interest.<sup>156</sup> Many colleagues appreciate inquiries from fellow travelers. Eventually, many non-law experiences can be integrated into the teaching of law. What the law teaching profession will be like in thirty or fifty years, we cannot know. Technology, globalization, economic changes, institutional changes, and differing societal expectations may remake our profession in unforeseeable ways. But as we rush into this future, I strongly believe that we must constantly re-assess our work in light of our past. In that respect, many who have thought about education inside and outside of law may have a fresh relevance.<sup>157</sup>

## VII. CONCLUSION

The teaching of the law can be the most marvelous of professions, but to appreciate its marvel, a professor needs to love the life of the law and to love the students in their infinite variety. Law teaching is not for everybody who loves the law or for everybody who loves to interact with students. As Professor Whaley so candidly advised:

Remember that this is your chosen profession. If you can take pleasure from this exciting occupation—teaching law to the leaders of tomorrow!—you will last a lot longer at your job and do it better too. If, after trying it for a few years, you find that you do not enjoy your classroom and in fact hate it, perhaps law teaching is not for you. Do yourself and your students the favor of changing jobs.<sup>158</sup>

For me, becoming a law professor has been a dream come true. If you are new to the profession or well seasoned, may your days in the classroom be fruitful and enjoyable.

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156. *E.g.*, Leslie Bender, *Teaching Torts Stories*, 55 J. LEGAL EDUC. 108 (2005); Ajay K. Mehrotra, *Teaching Tax Stories*, 55 J. LEGAL EDUC. 116 (2005); Thomas Ross, *Teaching Constitutional Law Stories*, 55 J. LEGAL EDUC. 126 (2005); Nancy S. Marder, *Teaching Civil Procedure Stories*, 55 J. LEGAL EDUC. 138 (2005); Laura S. Underkuttler, *Teaching Property Stories*, 55 J. LEGAL EDUC. 153 (2005) (delivering five great teaching law stories).

157. *See generally* REV. THOMAS HUGHES, S.J., *LOYOLA AND THE EDUCATIONAL SYSTEM OF THE JESUITS* (Roger McCaffrey Pub. 2000) (providing a challenging glimpse into the past).

158. Whaley, *supra* note 1, at 132.